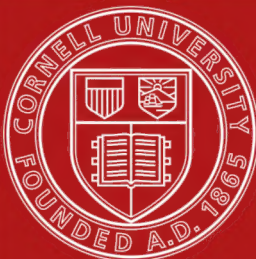


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CASES

ON THE

LAW OF EVIDENCE

SELECTED BY
PROF. H. L. WILGUS

Of the Law Department of the University of Michigan

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ILLUSTRATIVE CASES

ON THE

LAW OF EVIDENCE.

WILGUS, EV.

(1)*

WOOD RIVER BANK v. DODGE et al.
(55 N. W. 234, 36 Neb. 708.)

Supreme Court of Nebraska. April 26, 1893.

Error to district court, Hall county; Harrison, Judge.

Action by the Wood River Bank against Freeman C. Dodge and George F. Dodge. Defendants had judgment, and plaintiff brings error. Reversed.

James H. Woolley and Thompson Bros., for plaintiff in error. Thummel & Platt, for defendants in error.

MAXWELL, C. J. The plaintiff brought an action against the defendants to recover the sum of \$1,884.25, with interest. To the petition the defendants filed an answer, as follows: "Comes now the above defendants, and for answer to the petition of plaintiff say that they formed a limited partnership in the transaction of purchasing and selling hogs, and conducted said business in the name of Dodge Bros.; that they kept the account with the said plaintiff in all the transactions done, and banked with this plaintiff as Dodge Bros. for this business; that Freeman C. Dodge had a personal account with said bank, so did the said George F. Dodge, for their own personal transaction of business which had no connection whatever with the said Dodge Bros. business; that these defendants made all deposits done under the business in the name of Dodge Bros., and drew on the said plaintiff all the checks on the said plaintiff bank in the name of Dodge Bros. and none other; that George F. Dodge did all the business transactions for the said firm, and deposited all the funds for the sale of the property, and drew all the checks and money from the plaintiff in the name of Dodge Bros., and none other; that these defendants admit they drew from the said plaintiff the said sum of \$21,993.21, and no more; they also admit they deposited the sum of \$20,108.26 as credited to them in the petition, and also claim the fact to be that they paid or deposited the additional sum of \$7,332.47 to the said plaintiff, which the said plaintiff has neglected and refused to give them credit for as follows: On or about June 30, 1887, the United States National Bank deposited or paid to the plaintiff, to be placed to the credit of Dodge Bros., the sum of \$5,812.89; that on the 18th day of July, 1887, the said Dodge Bros. deposited or paid into plaintiff bank, to be credited to the said Dodge Bros., the sum of \$600; on September 5th, \$789.23; and September 9th, \$629.65; that the said defendants are not indebted to said plaintiff in any sum whatever, but that the plaintiff was indebted at the commencement of this action on the said account the sum of \$5,812.89, which sum the defendants claim justly due and wholly unpaid. Therefore pray judgment against said plaintiff in the said sum of \$5,812.89, over and above all claims so as aforesaid mentioned in plain-

tiff's petition, with interest thereon at 7 per cent. per annum from the 18th day of January, 1888, and costs." The plaintiff filed the following reply: "Now comes the above-named plaintiff, and for reply states: That it denies that the said defendants or either of them are entitled to the credit of \$7,012.89, the same being the \$5,812.89 and \$1,200 mentioned in said defendants' answer, or any other or different amount than as mentioned in the said plaintiff's petition, or that the said plaintiff received the said amounts, or either of them, except in said petition mentioned and herein stated; and as further reply states that the \$5,812.89 was received by the said plaintiff in draft in favor of said Dodge Bros. at the time in said answer mentioned, but that the same was claimed by the said Freeman C. Dodge to be his property, or mostly so, and the said Freeman C. Dodge then and there ordered the same placed to his credit on his individual account with the said bank, which the said bank then and there did; that the same was done by and with the knowledge and consent of the said George F. Dodge, and was afterwards by him ratified and adopted with the full knowledge of all of the foregoing facts; that the plaintiff has since the said time made and effected a settlement with the said Freeman C. Dodge, and by and with the consent of the said George F. Dodge allowed and given the said Freeman C. Dodge entire and full credit for the said sum of \$5,812.89, and that neither of said defendants are entitled to the said credit of the said amount on the account sued on in this case; that as to the fact as to whether or not the said defendants are partners, or were at the time the said account was made and business transacted, this plaintiff has neither knowledge nor information sufficient to form a belief, and therefore denies the same, and puts said defendants upon their proof. Wherefore the said plaintiff demands judgment against the said defendants as in its petition prayed." On the trial of the cause the jury returned a verdict for the defendants for the sum of \$4,719.71, upon which judgment was rendered.

Two errors are relied upon for a reversal of the judgment—First, that the verdict is against the weight of evidence; and, second, misconduct of certain jurors.

The testimony is undisputed that about the first of July, 1887, a large number of hogs were shipped in the name of Dodge Bros. to South Omaha; that the amount realized from these hogs was \$5,812.89, which was placed to the credit of the Wood River Bank in the United States National Bank of Omaha. Up to this point there is no dispute. It is claimed on behalf of plaintiff that the hogs in question were the property of Freeman C. Dodge, and paid for by him out of money obtained from the plaintiff, and that he directed the plaintiff to place the same to the credit of his individual account, which was done. This is denied by the defend-

ants. Both of the defendants testify that the money was deposited to the credit of Dodge Bros., and not to the credit of Freeman. All the officers of the bank, some of whom appear to be disinterested, testify that the credit was given to Freeman. We also find that in the bank book of George Dodge with the plaintiff, which is here in the record, these hogs were not credited to Dodge Bros. The officers of the bank testify that this book was delivered to George Dodge a few weeks after the transaction; that he returned, and stated that he and his wife had looked over it, and found it correct, except an item of \$20. George denies receiving the book until about the month of January after the transaction. He, in effect, admits the \$20 mistake. The mode of doing business with the bank seems to have been as follows: When a shipment of hogs was about to be made, the defendants would receive credit for the supposed value of the hogs, and were permitted to check the same out. It appears that about the 5th of September of that year Dodge Bros. made or were about to make a shipment of hogs to South Omaha, and received credit at the bank for \$600, a duplicate deposit slip being made. It is claimed by the plaintiff that on the same day a second duplicate deposit for \$600 was made. The defendant George Dodge testifies, in effect, that this was a second deposit, and that it was received from a second shipment of hogs. On the other hand, the cashier testifies that original credit was given in the morning, and the duplicate slip given to the defendant; that in the afternoon he came into the bank, and stated that he had not received a duplicate in the morning, and that thereupon the cashier issued a second duplicate slip for \$600, and wrote the abbreviated word "dupl." instead of "triplicate" on it. The agent of the railway company at Wood River was called, and stated in substance that a record was kept in his office of all shipments made from there, and but one car of hogs was shipped by Dodge Bros. at the time stated, and he in effect corroborates the testimony of the cashier. It is very evident, therefore, that Dodge is mistaken in his testimony, and that the cashier's testimony on that point is correct, and the verdict is against the weight of evidence.

2. The affidavit of one of the jurors was filed in support of one of the grounds of the motion for a new trial for the misconduct of certain jurors. It is as follows: "P. F. McCullough, being first duly sworn, deposes and says that he was a member of the jury to whom the above case was tried on Febr. 15th, 1890; that during the discussion of the case in the jury room the question came up as to whether Freeman C. Dodge did authorize the Wood River Bank to place the said \$5,812.89 to his own individual credit, when Mr. Hollister and Hockenberger both swore he did so authorize, and F. C. Dodge swore he was not in Wood River, Neb., on

July 2nd, 1887, the date of said credit, but was in Omaha, Neb.; that many of the jury were in doubt as to who was mistaken on this point, and so expressed themselves; that thereupon one C. C. Robinson, a member of said jury, stated that he knew Mr. Hollister and Mr. Hockenberger were mistaken as to that point, for he was in Omaha, Neb., and saw the said Freeman C. Dodge there himself on July 2, 1887, and he could not have been present in Wood River, Neb., on that day and ordered said credit; that many of said jury, and especially this affiant, having confidence in and relying upon the statement of said C. C. Robinson, became satisfied that said Hollister and Hockenberger were mistaken on this point, and so may be mistaken on other points, and thereupon he changed his vote from the plaintiff's favor to and for a verdict for this defendant." There is also an affidavit of W. H. Thompson to the same effect. There is also an affidavit of J. H. Woolley that the jury were sent out Saturday evening; that a number of them resided in the western part of the county, and were very anxious to return home; that they inquired of the bailiff the time when the last train would be due going west, and having ascertained the time the verdict was returned before that hour, and presumably without proper deliberation. The counter affidavit of Robinson is in the record as follows: "Chan C. Robinson, being sworn, deposes and says that he was one of the panel in the case of the Wood River Bank of Nebraska against Freeman C. Dodge and George F. Dodge, which case was tried and submitted to the jury on the 15th day of February, 1890; that affiant has heard read the affidavit of P. F. McCullough filed in and attached to the motion in this case for a new trial; that the matter in said affidavit, wherein said McCullough swore that this affiant said in the jury room while deliberating on their verdict that he, Freeman C. Dodge, could not have been at Wood River on the 2d day of July, as he, Chan Robinson, saw him in Omaha on that day, is wholly without foundation, and untrue; that this affiant did not say he saw said Dodge on the 2d day of July as aforesaid in Omaha; all affiant did say on this subject in the deliberation of said jury was wholly in regard to the evidence introduced on the trial. Affiant further says that the jury and each of them, so far as he knows and was informed, tried all honest means to impress others differing with them as to their views in the evidence and the instructions of the court; that after deliberating several hours on the matter they finally agreed upon their verdict brought into court and affiant did not in any way attempt, (except by argument) to convince others differing with him as to what he thought was right on the evidence in the case." It will be observed that Mr. Robinson does not make a full, unequivocal denial of the charge against him. The affidavit, in fact, is a skillful evasion of the

matter in issue. His statement that what he said was wholly in relation to the evidence in the case, and that he did not in any way attempt, except by argument, to convince others differing from him, falls far short of a denial of the charges. In *Richards v. State*, (Neb.) 53 N. W. Rep. 1028, it was held that a juror will not be permitted to state to his fellow jurors, while they are considering their verdict, facts in the case within his own personal knowledge. He should make the same known during the trial, and testi-

fy as a witness in the case. It is for the court to say what evidence is admissible in a case, and the adverse party may desire to cross-examine him. In any event, it is his duty to be governed by the evidence introduced on the trial, and the instructions of the court. Otherwise, in case of an erroneous verdict, it would be impossible to review the same. The judgment of the district court is reversed, and the cause remanded for further proceedings. The other judges concur.

NICKERSON v. GOULD.

(20 Atl. 86, 82 Me. 512.)

Supreme Judicial Court of Maine. April 3,
1890.

Exceptions from supreme judicial court,
Somerset county.

Walton & Walton, for plaintiff. *D. D. Stewart*, for defendant.

FOSTER, J. Action to recover upon a promissory note for \$500, dated February 9, 1876, payable on demand to E. B. Nickerson or bearer.

The defense was that the note was a forgery; that the defendant never signed it, and never had any dealings with the alleged payee out of which this note grew or could grow; that he never received any money or any property of any kind from him, except possibly a harness, and that was allowed on rent due the defendant.

The plaintiff, son of E. B. Nickerson, testified that he acquired title to the note in the fall of 1887.

The exceptions show that much evidence was introduced by both parties tending to show the transactions and the nature of them between E. B. Nickerson and the defendant in the years 1875 and 1876, as bearing upon the probability or improbability of the defendant having given the note in suit.

It was claimed on the part of the plaintiff that the note in suit was given to take up a \$300 note and interest, and a balance in cash at the time sufficient to make up the sum for which the note was given; and that the \$300 note was made up of \$40 loaned defendant to pay for a mowing-machine, \$50 cash loaned at another time, and a sufficient amount at the time the note was given to make up the \$300.

It appeared in evidence that in the latter part of May, 1888, in response to a letter, E. B. Nickerson went to the defendant's house, and there he and the defendant talked over the matter of the note; that at that interview, as the defendant and his wife testified, the defendant said he did not remember of ever having a dollar of him in his life; that Nickerson then asked the defendant if he did not remember of his paying him a note of \$200 at the Russell House, to which the defendant replied that he never did; that Nickerson then said to the defendant: "Don't you remember my paying Henry Sawyer fifteen dollars for you?" And to this the defendant replied: "No, sir; I don't remember it, and you never did."

The defendant then called the said Henry Sawyer as a witness, and asked him if Nickerson at any time paid to him \$15 for the defendant. This item did not constitute any part of the consideration of the note in controversy.

To this inquiry, and the answer thereto, the plaintiff's counsel objected, and the court excluded the answer.

The defendant then offered to show by the same witness that Nickerson never paid him the \$15 for the defendant, and, objection being interposed by the counsel for the plaintiff, the court excluded the evidence.

To this ruling, excluding the answer and the evidence offered, the defendant duly excepted.

After the evidence had been offered and excluded, the plaintiff called E. B. Nickerson, and he testified in relation to the interview at the defendant's house substantially as related by the defendant and his wife; but the defendant did not thereafter recall the witness Sawyer, nor again offer his testimony.

If the only bearing of the evidence offered was to prove a collateral fact, it was not relevant, and was properly excluded. The question is whether it was relevant or not. Collateral facts are not admissible. The evidence must be relevant to the issue; that is, to the facts put in controversy by the pleadings. This rule prohibits the trial of collateral issues,—of facts not put in issue by the pleadings,—and excludes evidence of such as are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. It is oftentimes difficult to decide what is and what is not relevant. It depends somewhat upon the nature of the issue involved. The relevancy of evidence of other facts, as bearing upon the probability or non-probability of the main fact in issue, has been one of the most troublesome questions for the courts to decide.

"Relevancy," as defined by the text-writers upon evidence, "is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the issue. * * * If the hypothesis set up for the defense is forgery, then all facts which are conditions of forgery are relevant. A party, for instance, sued on a bill sets up forgery. To meet this hypothesis, it is admissible for the plaintiff to prove that the defendant, at the time of the making of the bill, was trying to borrow money. * * * Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable," (1 Whart. Ev. §§ 20, 21;) and in accordance with this principle it was held by this court, in *Trull v. True*, 33 Me. 367, that "testimony cannot be excluded as irrelevant which would have a tendency, however remote, to establish the probability or improbability of the fact in controversy." *Tucker v. Peaslee*, 36 N. H. 167, 168. So in *Huntsman v. Nichols*, 116 Mass 521, where it was held that, although the authenticity of the note in suit was the only issue, yet the business transactions between the parties had some bearing upon the probability of the indorsement having actually been made by the defendant, and were therefore admissible in evidence. This same principle is established in *Eaton v. Telegraph Co.*, 68 Me. 63, 67; *State v. McAllister*, 24 Me. 139; *State v. Witham*, 72 Me. 531, 537; *Marcy v. Barnes*, 16 Gray, 161. Accordingly, where the issue is whether a certain contract was made between the parties, and the evidence is conflicting as to what the contract was, it has been held competent for the defendant to show the value or character of the property which he was to receive, as compared with that in the contract claimed by the plaintiff, as tending to show the improbability of the defend-

ant having made the contract as alleged by the plaintiff. *Upton v. Winchester*, 106 Mass. 330; *Norris v. Spofford*, 127 Mass. 85; *Bradbury v. Dwight*, 3 Metc. 31; *Parker v. Coburn*, 10 Allen, 82.

Moreover, in cases where knowledge or intent of the party was a material fact, evidence of other facts happening before or after the transactions in issue has been received in evidence, although they had no direct or apparent connection with it. Such facts, if they tend to establish knowledge or intent, when that is material, although apparently collateral and foreign to the main issue, nevertheless have a direct bearing, and are admissible. Thus in *Cook v. Moore*, 11 Cush. 213, 216, BIGELOW, J., says: "Whenever the intent of a party forms part of the matter in issue upon the pleadings, evidence may be given of other acts not in issue, provided they tend to establish the intent of the party in doing the acts in question." And see *Nichols v. Baker*, 75 Me. 334; *Jordan v. Osgood*, 109 Mass. 457; 1 Greenl. Ev. § 53; 1 Whart. Ev. §§ 30-33.

Applying these principles to the question before us, we think the evidence offered was admissible.

The pleadings denied the genuineness of the note, and all dealings with the alleged payee out of which the note could grow, or the receipt of any money from him. True, the central point of the issue was whether or not the note was a forgery. Around this revolved other facts, introduced by both parties, bearing on the probability or improbability of the defendant having signed the note in suit.

Such evidence was admissible as tending

to lead the mind of the jury to a correct conclusion upon the real issue presented. The dealings of the parties, both prior and subsequent to the date of the note, became a proper subject of inquiry in this connection. The defendant denied that he ever signed the note, or had any dealings whatever with the alleged payee out of which the note originated. He gives an interview with Nickerson, and states what he claims was said at that interview by Nickerson. At the interview Nickerson virtually asserted a fact, although in an interrogatory form, that he had paid one Henry Sawyer \$15 for the defendant. He asserted it as a transaction with the defendant. This, the defendant claims, was a fraudulent assertion to obtain an admission from him of what was not true in order to affect the main issue before the jury. It was, in effect, the assertion of a fact to the defendant bearing on the issue of the genuineness of the note, and was not collateral. Either party had a right to prove the truth or falsehood of the assertion. If it was not true, the defendant had a right to show that the statement made to him was false; and, in support of his own testimony in denial of its truth, he had a right to call the man as a witness to whom Nickerson claimed he made the payment. Its tendency in establishing the probability or improbability of the main fact in controversy may have been remote, but it was nevertheless admissible. Its weight was for the jury.

Exceptions sustained.

PETERS, C. J., and WALTON, VIRGIN, EMERY, and HASKELL, JJ., concurred.

COMMONWEALTH v. ROBINSON.

(16 N. E. 452, 146 Mass. 571.)

Supreme Judicial Court of Massachusetts.
Middlesex. May 3, 1888.

Exceptions from supreme judicial court,
Middlesex county; Field and Knowlton,
Judges.

Indictment against Sarah J. Robinson for the murder of her brother-in-law, Prince Arthur Freeman, by poisoning. Trial in the supreme judicial court, where the defendant was found guilty, and she alleged exceptions.

Andrew J. Waterman, Atty. Gen., for the Commonwealth. J. B. Goodrich and D. F. Crane, for defendant.

C. ALLEN, J. We have given to this case a degree of attention commensurate with its importance, and have come to the conclusion that there was no error in the conduct of the trial. While it is well settled in this commonwealth that, on the trial of an indictment, the government cannot be allowed to prove other independent crimes, for the purpose of showing that the defendant is wicked enough to commit the crime on trial, this rule does not extend so far as to exclude evidence of acts or crimes which are shown to have been committed as part of or in pursuance of the same common purpose. *Com. v. Jackson*, 132 Mass. 16, 18; *Com. v. Blood*, 141 Mass. 575, 6 N. E. 769. In such cases there is a distinct and significant probative effect resulting from the continuance of the same plan or scheme, and from the doing of other acts in pursuance thereof. It is somewhat of the nature of the acts or declarations of intention, but more especially of preparations for the commission of the crime which is the subject of the indictment. If, for example, it could be shown that a defendant had formed a settled purpose to obtain certain property, which could only be got by doing several preliminary things, the last of which in the order of time was criminal, the government might show, on his trial for the commission of that last, criminal act, that he had formed the purpose to accomplish the result of obtaining the property, and that he had done all of the preliminary things which were necessary to that end. This would be quite plain if the evidence of the purpose were direct and clear; as if a letter in the defendant's handwriting should be discovered, stating in terms to a confederate his purpose to obtain the property by the doing of the several successive acts, the last of which was the criminal act on trial. In such case no one would question that proof might be offered that the defendant had done all the preliminary acts referred to, which were necessary steps in the accomplishment of

his purpose. But such purpose may also be shown by circumstantial evidence. It is, indeed, usually the case that intentions, plans, purposes, can only be shown in this way. Express declarations of intention, or confessions, are comparatively rare; and therefore all the circumstances of the defendant's situation, conduct, speech, silence, motives, may be considered. The plan itself, and the acts done in pursuance of it, may all be proved by circumstantial evidence if they are of themselves relevant and material to the case on trial. And in such a case it makes no difference whether the preliminary acts are criminal or not. Otherwise the greater the criminal the greater his immunity. Such preliminary acts are not competent because they are criminal, but because they are relevant to the issue on trial; and the fact that they are criminal does not render them irrelevant. Suppose, for further example, one is charged with breaking a bank, and there is evidence that he had made preliminary examinations from a neighboring room; the fact that his occupation of such room was accomplished by a criminal breaking and entering would not render the evidence incompetent. It is sometimes said that such evidence may be introduced where the several crimes form part of one entire transaction; but it is perhaps better to say, where they have some connection with each other, as a part of the same plan, or induced by the same motive. Precedent acts which render the commission of the crime charged more easy, more safe, more certain, more effective, to produce the ultimate result which formed the general motive and inducement, if done with that intention and purpose, have such a connection with the crime charged as to be admissible, though they are also of themselves criminal. We do not understand that this general view, stated thus, is distinctly controverted by the counsel for the prisoner; and it is supported by a great number of decisions, only a few of which are here cited. *Com. v. Scott*, 123 Mass. 222; *Com. v. Choate*, 105 Mass. 451; *Swan v. Com.*, 104 Pa. St. 220; *Goerson v. Com.*, 99 Pa. St. 388; *Shaffner v. Com.*, 72 Pa. St. 60; *Mayer v. People*, 80 N. Y. 364, 375. See, also, *Jordan v. Osgood*, 109 Mass. 457. For cases where such connection was not shown, but where the principle was recognized, see *Com. v. Jackson*, 132 Mass. 16; *State v. Lapage*, 57 N. H. 245, 295; *People v. Sharp*, 14 N. E. 319, (opinion by Peckham, J.) The ruling at the trial, therefore, was correct, that if evidence should be offered and admitted tending to show that the prisoner knew, before her sister's death, of the existence of the insurance, and that it could be transferred on the death of her sister to herself, and made payable to herself on the death of Freeman, and that, before her sister's death, she had formed a plan or inten-

tion to obtain this insurance for her own benefit, and this plan or intention continued to exist or be operative up to the time of Freeman's death, then that evidence might be offered to show that her sister died of poison, and that the prisoner administered it, as a part of the method employed by her to carry this plan or intention into effect, in connection with evidence that she administered poison to Freeman, as another part of the same plan and with the same general intention.

The court therefore properly held that evidence of this knowledge and plan or intention on the part of the prisoner should first be offered, that the court might judge whether it was sufficient to warrant the introduction of evidence that the sister died of poison administered by the prisoner. This claim and offer of proof on the part of the government, and the arguments of counsel, and the said ruling of the court thereon, were all made in open court, in the prisoner's presence, but in the absence of the jury. The government accordingly proceeded to introduce, with its other evidence to the jury, certain testimony in support of said alleged scheme or intention on the part of the prisoner, which is stated in the bill of exceptions; and, after said testimony had been received, it offered evidence tending to prove the death of the prisoner's sister by arsenic knowingly administered by the prisoner. This evidence was objected to, on the ground that no sufficient evidence had been offered in proof of said alleged scheme or intention, and on other grounds; but the court overruled the objection, and admitted the evidence, subject to the prisoner's exception. In seeking a new trial on account of the admission of this testimony, the argument of the prisoner's counsel, briefly stated, is as follows: Preliminary evidence must be given to show that the acts offered to be proved were done in pursuance and as a part of some plan or scheme to accomplish the particular result. It is the exclusive province of the court to determine if such evidence is sufficient. The decision of the court, admitting the evidence, is subject to revision in the present case; the testimony upon which that decision was founded having been reported for the purpose. It is not enough that there was some evidence, but the preliminary evidence must amount to proof. The ruling of the court did not expressly affirm the necessity of such proof; that is, as we understand the argument, the necessity of such amount or degree of proof. And, finally, this court, upon a revision of the preliminary evidence reported, should now hold that it was not sufficient to warrant the introduction of evidence to show that the prisoner poisoned her sister, Mrs. Freeman. The last three of these propositions are the only ones which need any further attention. A consideration of the nature of the question which is presented to the court when it is

called upon to decide upon a preliminary question of fact, in order to determine whether offered evidence shall be received, will show that its determination reaches no further than merely to decide whether the evidence may or may not go to the jury. The decision upon this particular question, of the admissibility of the evidence, is ordinarily conclusive, unless the judge sees fit to reserve or report the question for future revision. *Dole v. Thurlow*, 12 Metc. (Mass.) 157; *Gorton v. Hadsell*, 9 Cush. 508, 511; *O'Connor v. Hallinan*, 103 Mass. 547; *Walker v. Curtis*, 116 Mass. 98. And in this respect the rule is the same in criminal cases. *Com. v. Hills*, 10 Cush. 530; *Com. v. Mullins*, 2 Allen, 295; *Com. v. Morrell*, 99 Mass. 542; *Com. v. Culver*, 126 Mass. 464; *Com. v. Gray*, 129 Mass. 474. But where, in a case like the present, the admissibility of testimony depends upon the determination of some prior fact by the court, there is no rule of law that, in order to render the testimony admissible, such prior fact must be established by a weight of evidence which will amount to a demonstration, and shut out all doubt or question of its existence. It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury. The fact of the admission of the evidence by the judge does not in a legal sense give it any greater weight with the jury. It does not affect the burden of proof, or change the duty of the jury in weighing the whole evidence. They must still be satisfied, in a criminal case, upon the whole evidence, beyond a reasonable doubt. Ordinarily, questions of fact are exclusively for the jury, and questions of law for the court. But when, in order to pass upon the admissibility of evidence, the determination of a preliminary question of fact is necessary, the court, in the due and orderly course of the trial, must necessarily determine it, as far as is necessary for that purpose, and usually without the assistance, at that stage, of the jury. If, under such circumstances, testimony is admitted against a party's objection, it may often happen that he may still ask the jury to disregard it.

Numerous illustrations of the foregoing view might be given, but a few must suffice us. In an indictment for murder, where the question was as to the admissibility of certain statements in the nature of confessions, which were objected to as having been obtained by means of inducements, it was held by this court as follows: "When a confession is offered in a criminal case, and the defendant objects that he was induced to make it by threats or promises, it necessarily devolves upon the court to determine the preliminary question whether such inducements are shown. * * * If the presiding judge is satisfied that there were such inducements, the confession is to be rejected; if he is not satisfied, the evidence is admitted. But, if

there is any conflict of testimony or room for doubt, the court will submit the question to the jury, with instructions that, if they are satisfied that there were such inducements, they shall disregard and reject the confession." *Com. v. Piper*, 120 Mass. 190. Similar questions arise when it is objected that a witness is not of sufficient capacity to testify intelligently; or that a third person, whose declarations or acts are offered in evidence against a party, was not a partner, agent, or co-conspirator, and did not stand in such a relation as to make his declarations or acts admissible; and in other cases. In *Com. v. Brown*, 14 Gray, 419, which was an indictment for causing the death of a woman by means of an attempt to procure a miscarriage, the judge at the trial decided, as matter of fact, on the preliminary question, that there was *prima facie* evidence that the defendant and two other persons were jointly acting in combination and concert, and aiding and assisting each other in carrying out a common enterprise of procuring an abortion, so as to make the acts and declarations of those two persons competent, and admitted the evidence, and then left the question to be determined by the jury whether they were acting in concert with the defendant or not, with instructions that, if so, the acts and declarations might be considered by them; otherwise not. This course was held by this court to be correct, (pages 425, 426, 432;) the court saying: "The conspiracy of the parties was first satisfactorily made to appear to the court." In *Com. v. Crowninshield*, 10 Pick. 497, a similar doctrine was held. In all such cases, the court, in deciding to admit the offered testimony, does no more than to hold that enough has been shown to make it proper to submit the testimony to the jury, leaving its weight and credit for their determination. The decision of the judge does not relieve the party offering the testimony from the necessity of establishing every material fact to the satisfaction of the jury. See, also, *Com. v. Scott*, 123 Mass. 235; *Com. v. Waterman*, 122 Mass. 43, 59; *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494; *Ormsby v. People*, 53 N. Y. 472; *Swan v. Com.*, 104 Pa. St. 218; 1 Greenl. Ev. §§ 49, 111; *Steph. Dig. Ev.* (Chase's Ed.) art. 4. In this view of the law, it was not necessary that the court should find that the preliminary evidence amounted to full proof, beyond a reasonable doubt, that the prisoner poisoned her sister, in pursuance of a general plan or scheme in which the poisoning of Mr. Freeman was a later step.

We are further of the opinion that the preliminary evidence which was before the court was sufficient to warrant the introduction of evidence to show that the prisoner poisoned her sister, Mrs. Freeman. Certain facts were not in dispute. Prince Arthur Freeman, the person whom the prisoner was charged in the indictment with having poisoned, held a cer-

tificate of membership in a society, which provided for the payment of \$2,000 upon his death to the beneficiary named therein, with a power of substitution. His wife, who was the prisoner's sister, was named as beneficiary. She died February 26, 1885, after an illness of about three weeks. The prisoner called at Freeman's house, in South Boston, on February 20th, and on February 23d went there to take care of Mrs. Freeman, and stayed till her death. Immediately after Mrs. Freeman's death, Mr. Freeman, with his two children, went to live with the prisoner at her house in Cambridge. One of the children died in April. On or about May 13th, Mr. Freeman appointed the prisoner as beneficiary under the certificate of membership. He died June 27th, after an illness of about six days, from arsenic. The prisoner on September 23, 1885, received \$2,000 from the society upon said certificate. Prior to 1885 the prisoner was owing several hundred dollars, which she was unable to pay, and for which she was hard pressed by her creditors, and which she paid out of the \$2,000 so received by her. As tending to prove the plan or scheme on her part to obtain this life insurance money through the murder of Mrs. Freeman and then of Mr. Freeman, there was evidence to the effect that, before Mrs. Freeman's death, the prisoner knew of the certificate of membership insuring Mr. Freeman for his wife's benefit; that, during Mrs. Freeman's illness, the prisoner expressed the opinion that her sister would never recover, and said that she (the prisoner) had had a terrible dream, and, whenever she had a dream like that, one of the family always died; that, before as well as after Mrs. Freeman's death, the prisoner expressed the wish to have Mr. Freeman, with his children, come and live with her, and asked different persons to urge him to do so; that, on the day of Mrs. Freeman's funeral, the prisoner said that Mr. Freeman's sister, Mrs. Melvin, was very anxious to have him live with her, and that all Mrs. Melvin wanted was to get the insurance made over to her, but the prisoner said she (herself) had the best right to it, and it was her sister's request that it should be made over to her, and she wanted it; that on the same day she talked with Mr. Freeman about the insurance, wanted to know if it was made over to her, and he said it was not, but should be; that quite frequently afterwards she said she was afraid he would not make it over to her; that on June 22d, the same day when he was taken sick, (which was after it had been made over to her,) she sent to the society to see if the papers were right, in case anything happened to Mr. Freeman, and whether she would get the insurance, and to see that all assessments were paid up; that the appointment for the money to be payable to her was recorded in the books of the society not earlier than June 23d; that she also sent over to see about the insurance once or twice afterwards,

before his death, and had an interview with the secretary of the society upon the same subject in Mr. Freeman's presence, the day before his death, and was told that the papers were all right, and afterwards, when not in his presence, requested the secretary not

to tell Mr. Freeman's sister about the insurance. This evidence certainly tended to show a scheme and plan, entered into before Mrs. Freeman's death, to have the insurance money made payable to the prisoner.

Exceptions overruled.

BUDDRESS v. SCHAFER et al.

(41 Pac. 43.)

Supreme Court of Washington. July 15, 1895.

Appeal from superior court, King county; R. Osborn, Judge.

Action by A. W. Buddress against John Schafer and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. C. Whitlock and Million & Houser, for appellants. A. W. Buddress, Metcalf & Jurey, and Geo. H. Jones, for respondent.

GORDON, J. This action was brought by respondent to recover the sum of \$500 for services as an attorney and counselor at law in "prosecuting and conducting certain causes in the superior court of the state of Washington for the county of Island, in which said causes said defendants (appellants) were plaintiffs and Henry Alexander and Kitty Alexander were respondents." Respondent also claims the sum of \$50 by way of expenses, costs, and disbursements necessarily incurred in the prosecution of said suit. In his complaint it is alleged "that said services were reasonably worth the sum of \$500, and that said defendants (appellants) promised and agreed to pay what the same were reasonably worth." The answer of the appellants merely denied that the "services were worth the sum of \$500, or any sum whatever," and for an affirmative defense set up that the matter had been adjudicated in a trial between the same parties on the same subject-matter. There was a verdict for respondent in the sum of \$225, and from judgment entered thereupon, and an order denying a new trial, this appeal has been taken.

Upon the trial appellants offered to show that they had employed other attorneys to prepare the pleadings and try the identical causes referred to in respondent's complaint. The proof was excluded, and this ruling is assigned as error. The apparent object of this testimony was to dispute the amount and extent of plaintiff's services. The respondent contended, and the court below held, that appellants could not, under their answer, deny that the services were rendered by respondent, and that appellants should be confined to the question of the value of the services so rendered; and we think the ruling was correct. It was the right of appellants to have demanded a bill of particulars, or to have required a more definite statement, if the character and extent of the services were indefinitely set forth in the complaint; but under a mere denial of the value of the services they were not entitled to show that the services were not rendered. *Van Dyke v. Maguire*, 57 N. Y. 429. The court committed no error in allowing re-

spondent to testify as to the amount expended by him for hotel and traveling expenses, nor in limiting the cross-examination of the witnesses Scott and Coleman, nor in the instruction given the jury concerning the effect to be given the testimony upon the subject of the value of professional services. We do not think that the language of the instruction was calculated to mislead the jury, and it is manifest from the verdict that such could not have been its effect.

Coming now to the question of former adjudication of the matters involved in this controversy, it appears from the record that respondent had instituted a prior suit to recover the sum of \$500 as attorney's fees. That action was founded upon an express contract to pay said sum for said services. No other question was litigated therein. The question of the reasonable value of respondent's services, or of respondent's right to recover such reasonable value, was withheld from the consideration of the jury in the trial of that case. Referring to this prior suit, which was relied upon as a bar to respondent's right to recover in this action, the learned counsel for appellants upon the trial of this cause below admitted that no evidence was offered in the former trial to prove what the services were worth, but that the only question submitted for determination was upon respondent's theory of an express contract. We think the law is well settled that a judgment in a former suit on an express contract is not a bar to the second suit on a quantum meruit for the same services, and to determine whether a former judgment is a bar to a subsequent action it is necessary to inquire whether the same evidence would have maintained both of such actions. 1 *Freem. Judgm.* § 259; *Kirkpatrick v. McElroy* (N. J. Err. & App.) 7 Atl. 647. In *Taylor v. Castle*, 42 Cal. 372, the court say: "The cause of action is said to be the same where the same evidence will support both actions; or, rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain a judgment for the plaintiff in the present action would have authorized a judgment for the plaintiff in the former." In 2 *Black, Judgm.* § 726, the learned author says: "For the purpose of ascertaining the identity of the causes of action, the authorities generally agree in accepting the following test as sufficient: Would the same evidence support and establish both the present and the former cause of action? If so, the former recovery is a bar; if otherwise, it does not stand in the way of the second action." We have examined the error assigned by appellants in permitting respondent to explain the record of the former trial, but think that no error was committed. If, however, we were constrained to the opposite view, the same result would follow, in view of the admissions

made by appellants' counsel upon the trial of this case in the court below as to the proceedings occurring upon the trial of the former action, which resulted in a judgment for defendants. No substantial error appearing in the record, the judgment will be affirmed.

ANDERS and DUNBAR, JJ., concur.
HOYT, C. J., dissents.

ROBINSON CONSOLIDATED MIN. CO. v. JOHNSON.

(22 Pac. 459, 13 Colo. 258.)

Supreme Court of Colorado. Oct. 11, 1889.

Appeal from district court, Lake county. The allegations of the complaint in this action, so far as they are necessary to a correct understanding of the matters involved in this appeal, are to the following effect: That in 1882, William H. Johnson, appellee herein, plaintiff below, entered into a verbal contract with the Robinson Consolidated Mining Company, defendant, a corporation duly organized, to furnish, sell, and deliver to defendant at its smelting works, in the town of Robinson, Summit county, Colo., 240,000 bushels of charcoal at the stipulated price of 13 cents per bushel; that in pursuance of said contract plaintiff commenced and continued to furnish, sell, and deliver said charcoal in divers lots and quantities until he had so sold and delivered 32,000 bushels thereof to defendant, all of which was received and accepted by defendant at its said smelting works; that plaintiff was ready and willing, and offered, to deliver the balance of said charcoal according to the terms of said contract, but that defendant absolutely refused to receive, accept, or pay for the same. The plaintiff, by reason of defendant's refusal to accept the residue of the charcoal contracted for, was compelled to sell the same for 11 cents per bushel, which was the best price he could obtain therefor. There were other elements of damage alleged which need not be here stated, inasmuch as they were substantially stricken out of the case before the trial, and do not appear to have been relied on. Defendant demurred to the complaint on several grounds, among others, that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendant then answered, denying specifically the allegations of the complaint; and the case, being tried to the court without a jury, resulted in a finding and judgment in favor of the plaintiff for the sum of \$4,000. The defendant appeals.

Teller & Orahood, for appellant. *Patterson & Thomas*, for appellee.

ELLIOTT, J., (after stating the facts as above.) This was an action by a vendor against a vendee of goods for refusal to accept and pay for the same. The complaint alleges that the plaintiff entered into a contract with defendant to furnish, sell, and deliver to defendant a certain quantity of charcoal at a certain stipulated price. But it is nowhere alleged that defendant bought, purchased, or agreed to accept or pay for the same, or any part thereof. For this reason it is contended by appellant that the contract as stated is unilateral; and that the complaint is defective in substance. It is certain that the usual form of declaring in cases of this kind was not observed. The nature of the action requires that the pleading should be special. 2 Chit. Pl. 264; Puter. Pl. 130; 1 Estee, Pl. & Pr. § 1375; Beni. Sales, §§ 758-765.

Notwithstanding forms of actions have been abolished in this state, the substantial requisites of pleadings have not been

changed. Useless fictions, antique phraseology, technical commencements and conclusions, have been swept away, but the legal rights and liabilities of parties remain the same; and the facts upon which these rights and liabilities depend are required to be stated in "ordinary and concise language." While particular forms of pleading are no longer essential, yet experience teaches that it is well to adhere to the "ordinary and concise language" of approved forms in stating causes of action as well as grounds of defense, lest, in departing too far from the form, we fail to state the substance.

It is contended by plaintiff's counsel that defendant cannot now be heard to object to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, for the reason that he pleaded over and went to trial. We are aware it has been held, where an answer by its terms supplies the defects of a complaint otherwise obnoxious to a general demurrer, that the defective complaint is thereby cured. This is what Mr. Chitty calls "express aider." The case of *Slack v. Lyon*, 9 Pick. 62, is not in point. In that case, the defendant pleaded over without demurrer, and in his answer alleged the very facts the omission of which made the complaint defective, and, upon recovery being had in favor of the complainant, the defendant moved in arrest of judgment, which was denied. In this case, defendant demurred in the first instance, and his answer thereafter filed consists of specific denials only. In *Slack v. Lyon*, supra, a very old case is referred to, (*Drake v. Corderoy*, Cro. Car. 288,) where the complaint was defective in substance, and the court remarked: "Had the defendant pleaded the general issue, the plaintiff could not have had judgment." Bliss, Code Pl. § 438.

The terms of the contract, as set out in the complaint, show no promise, undertaking, agreement, or obligation on the part of defendant to accept or pay for any portion of the charcoal, except that the law implies a promise on his part to pay for that which he actually received. As to such portion, there is no claim that he did not pay for it; so the case does not fall under that class of unilateral contracts, in which a party not bound by the terms thereof while it remains executory may nevertheless become bound to the extent he accepts the benefits thereof. *Gordon v. Darnell*, 5 Colo. 302; *Stiles v. McClellan*, 6 Colo. 89; *Lester v. Jewett*, 12 Barb. 502; *Railway Co. v. Mitchell*, 38 Tex. 85; *McKinley v. Watkins*, 13 Ill. 140; *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. Rep. 213; 1 Pars. Cont. 448, note z; *Sykes v. Dixon*, 9 Adol. & E. 693; *Bean v. Burbank*, 16 Me. 458. It is contended that the allegation that plaintiff was to furnish, sell, and deliver to defendant a certain quantity of charcoal, at a certain stipulated price, implies that defendant agreed to receive and pay for such quantity at the price stated. It is true the law implies a promise to pay on the part of one who actually receives goods at a price for which the other party has engaged to deliver; because it would be unconscionable that the receiver should accept goods for which he knew the other party expected payment, and not render the consideration therefor.

But there may be an engagement to deliver without the corresponding engagement to receive. A promise is a good consideration for a promise; but the law does not imply because one party makes a promise that the promisee makes a promise in return. Parties are at liberty to make such contracts as they please. Options may be reserved by either party to a contract which may render the same unilateral and incapable of enforcement, except so far as the same may have been voluntarily carried into effect.

It is strongly urged that the words "entered into a contract with defendant" show that there was mutuality in the contract between the parties, and that both are bound. These preliminary words doubtless indicate that two parties made the contract, such as it was; and they may induce expectation of mutuality in the terms or obligation of the contract thereafter to be stated. But it does not follow because two parties have made a contract that therefore each or either are bound thereby. If mutuality of obligation necessarily resulted from a joint making, then there could be no such thing as a unilateral contract, since a contract or agreement is always the product of two or more minds. In this connection counsel for appellee in their printed argument make use of the following quotation: "A contract is an agreement between two or more persons to do or not to do a particular thing. The obligation of a contract is found in the terms of the agreement." This language is ascribed to Chief Justice TANER, who delivered the opinion of the court in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, when, in fact, the words occur in the dissenting opinion of Mr. Justice MCLEAN. This was doubtless an inadvertence, as the same mistake occurs in *Bouvier's Law Dictionary*. But as the decision of the case does not turn upon the correctness of the abstract definitions thus announced, they may be accepted as correct. Having made this quotation, counsel argue that the statement that a contract was entered into is a conclusion arising from facts under the law, and is a mode of pleading not prohibited by any system; that the obligations of the charcoal contract are to be found in its terms, and its terms are to be found from the evidence, and the evidence is a statement of the facts from which the conclusion that a contract exists has been drawn. *Hanna v. Barker*, 6 Colo. 312, and *Orman v. City of Pueblo*, 8 Colo. 292, 6 Pac. Rep. 931, are relied on to sustain this course of reasoning. The former case sustains the proposition that an averment that certain parties—named—entered into an agreement in writing with certain other parties—named—is a sufficient averment of the delivery of the agreement between the parties; but neither of these cases warrant the inference that it is not necessary to aver in the complaint the terms of the contract sued on so as to show the obligation resting on the defendant as a condition to holding him liable for the breach thereof. On the contrary, in the former case the contract was set out *in hæc verba* in the complaint, while in the latter the complaint was not defective in substance, and the objection referred to in the opinion could have been cured by a bill of particulars.

It is assigned for error that the contract

attempted to be proven at the trial was not the contract stated in the complaint. The contract stated in the complaint was for the sale and delivery of 240,000 bushels of charcoal at defendant's smelting works. No time being specified for the delivery of the coal, the law implies that it was to be delivered within a reasonable time, which time, in case of controversy, must be determined by the court from the facts and circumstances of the case. 2 Pars. Cont. 535. The contract which the evidence tended to establish was a contract for the delivery of good merchantable kiln pine coal, 2,500 inches to the bushel, 20,000 bushels per month for 12 months. It may be, in attempting to prove the performance of a contract to deliver 240,000 bushels of charcoal, where no time for the delivery is specified, that it would be competent to show that a delivery at the rate of 20,000 bushels per month would be a delivery within a reasonable time. But this was not what was undertaken to be shown. No evidence as to what would be a reasonable time was elicited or offered. The evidence tended to prove an express contract to deliver 20,000 bushels a month, no more, no less, without reference to the circumstances or difficulties of the delivery bearing upon the question of reasonable time. This evidence was objected to as incompetent under the statements of the complaint, and as variant from its allegations. The variance is apparent. As a rule, where there is an express contract, parties cannot abandon it and resort to an implied one; but the contract as made must be the measure of their respective rights and liabilities. The defendant had a right to be advised by the pleadings in advance of the trial of the substantial terms and conditions of the contract under which its liability to a judgment was sought to be enforced. Hence the variance was material, and the issue under the evidence should have been found against the plaintiff for that reason. Steph. Pl. 118; 1 Chit. Pl. 318, 319; Bliss, Code Pl. § 438 et seq.; *Cheney v. Barber*, 1 Colo. 73.

We have carefully considered whether or not under section 78 of the Code, relating to defective pleadings and variances, the errors discussed in this opinion might be properly disregarded. The provisions of the Code are liberal in allowing, upon proper application and terms, the correction of mistakes in the pleadings and proceedings in civil actions. We should not be disposed to allow parties to take advantage of ordinary defects for the first time in the appellate court. But when a party makes objection on account of a material or substantial defect, in a proper manner, and in apt time, and the opposite party, instead of applying for leave to amend, succeeds in procuring a ruling in his favor by the trial court, he does so at his peril.

In view of the foregoing conclusions, we do not deem it necessary to discuss at length the other assignments of error. If there was a contract for the delivery of the coal within 12 months, and the buyer actually received and accepted a part thereof within that period, the claim that the contract was void under the statute of frauds would seem to be unfounded. The judgment of the district court is reversed, and the cause remanded.

CARLTON v. PEOPLE.

(37 N. E. 244, 150 Ill. 181.)

Supreme Court of Illinois. May 5, 1894.

Error to circuit court, Johnson county;
A. K. Vickers, Judge.

Indictment of Jonathan Carlton for arson.
Defendant was convicted, and he brings error. Affirmed.

Morris, Moore & Vankirk, for plaintiff in error. Maurice T. Moloney, Atty. Gen., T. J. Scofield, M. L. Newell, and Geo. G. Gillespie, for the People.

MAGRUDER, J. This is an indictment against the plaintiff in error for arson. The indictment charges him, in the usual form, with setting fire to and burning the barn of one Rob Roy Ridenhour. The jury found him guilty, and fixed his punishment at imprisonment in the penitentiary for a term of four years. Motions for new trial and in arrest of judgment were made and overruled. Judgment was rendered, and sentence pronounced, in accordance with the verdict.

On the afternoon of Saturday, April 9, 1892, plaintiff in error was arrested for a violation of a town ordinance at Vienna, in Johnson county, by the town marshal, assisted by one of the deputy sheriffs, and also by the said Ridenhour. He was taken to the county jail in an intoxicated condition, having a knife in his hand and a revolver in his pocket. He and Ridenhour each lived in the country, about four and a half miles from Vienna, and had ridden into town together on the morning of that day. His arrest was made with difficulty, and after a scuffle. By direction of Ridenhour his knife and revolver were taken away from him. While he was lying upon his back in the hallway of the jail, his arms and feet being held by those who arrested him, he said: "Oh, yes, Bob Ridenhour, you live in the country, and you will think of this, God damn you, when your barn is on fire." He repeated the remark several times, varying the expression, saying, according to one witness: "You will think of this when you see your barn in flames;" according to another: "You will think of this when your barn is burned. Your barn is on a high hill. It will look well when it is burning." He was released from jail between 10 and 11 o'clock on the night of that same day, and left town about 11 o'clock, in company with Thomas Verhines and Edward Hogg, each of the three riding on horseback. The plaintiff in error stopped on the way at the house of a Mrs. Bridges, and obtained some matches. They rode together about a mile, when they separated, Verhines going east, and Carlton and Hogg going south. Plaintiff in error and Hogg continued to ride together about a mile further, where they separated, the former going southeast, and the latter going southwest. The home of Carlton was about 2 miles, and that of Hogg about

2½ miles, from the point where they separated. In going to his home from this point, plaintiff in error would pass in sight of Ridenhour's house. Ridenhour's barns were burned that night. He says that he went to bed between 10 and 11 o'clock, and that it was after midnight when he first saw the fire. On the next day—Sunday, April 10th—an examination was made of the premises. Tracks were found south of the barn, in a path leading to the highway, which ran in the general direction of the house of plaintiff in error. Mud was found upon the fence at the corner of the field, indicating that someone had climbed over the fence. The oats in the field had not come up. An examination of the tracks showed that one foot had made a deeper impression than the other. Carlton was arrested on that Sunday afternoon. A measurement of the tracks showed that they corresponded in length with tracks made by Carlton in the road on that day, and with the shoes worn by him on that afternoon. It was proven that he was lame, and walked with "a kind of hop." One of the witnesses says: "The foot he limped on corresponded to the irregular tracks in the field." Two barns were burned, containing corn, hay, mules, and horses. The horses escaped, but one of the mules was burned to death, and the corn and hay were destroyed. Hogg says that he saw no fire when he passed with Carlton.

The only evidence introduced on the defense seems to have had for its object the proof of an alibi. The testimony tends to show that the barns were on fire after midnight, and somewhere about 1 o'clock, though one of the witnesses says he saw the fire at 4 o'clock in the morning, and, when he saw it, went to it from his house, a half mile distant, and found the barns "pretty well all burned down." The evidence does not certainly fix the hour when the plaintiff in error reached his home on the night of the fire. His mother swore that "it was about twelve o'clock, or near that." One of his sisters swore that she heard the clock strike 12, and another that she heard it strike 1, after his arrival.

Counsel for plaintiff in error make the general objections that there is an absence of evidence relative to the corpus delicti, and that the evidence is purely circumstantial. "The proof of the charge in criminal causes involves the proof of two distinct propositions: First, that the act itself was done; and, secondly, that it was done by the charged, and by none other,—in other words, proof of the corpus delicti and of the identity of the prisoner." 3 Greenl. Ev. § 30. Here the act done, which was to be proven, was the burning of the barn. It was also required to be proven that the barn was burned by the plaintiff in error, and that such burning was done with felonious intent, or, in the language of the statute, "willfully and maliciously." 1 Starr & C. Ann. St. p.

750; 3 Greenl. Ev. §§ 55, 56. It has been said that in arson the corpus delicti consists not only of a fact that a building has been burned, but also the fact that it has been willfully fired by some responsible person. *Winslow v. State*, 76 Ala. 42. The main fact, however, which is to be proven in the first place, is the burning of the building. When that fact is established, then it is necessary to show how the act was done, and by whom. We think that, in the present case, the fact that the barns were burned was clearly and satisfactorily proven; and the circumstances were such as to exclude accident or natural causes as the origin of the fire. When the general fact is thus proved, a foundation is laid for the introduction of any legal and sufficient evidence that the act was committed by the accused, and that it was done with criminal intent. *Sam v. State*, 33 Miss. 347; *Phillips v. State*, 29 Ga. 105. Such evidence need not be direct and positive, but may be circumstantial, in its character. *Winslow v. State*, supra. In both criminal and civil cases "a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce." 1 Greenl. Ev. § 13a. After a careful examination of the evidence in this case we are not prepared to say that the jury were not warranted in finding the verdict returned by them. Among the circumstances which may be judicially considered as leading to important and well-grounded presumptions are "motives to crimes, declarations or acts indicative of guilty consciousness or intention, [and] preparations for the commission of crime." *Wills. Circ. Ev.* p. 39. It appears from the facts above recited that there was evidence here which tended to show the existence of just such circumstances as are thus indicated,—revenge for arrest and imprisonment, threats that the barns would be burned, and halting on the way to obtain matches. The evidence of the footprints and their correspondence with the defendant's feet was competent, and, though "not by itself of any independent strength is admissible with other proof as tending to make out a case." *Whart. Cr. Ev. (8th Ed.)* § 796. In *Winslow v. State*, supra, where the indictment was for arson, and "there was evidence tending to show a fresh track in the lane leading from the road to the house; [and] that this track and the track of the defendant corresponded," it was said: "The previous threats of the defendant, and his declarations in the nature of threats, were, on the same principle, properly admitted. While they are not of themselves convincing of guilt, from them, in connection with the other circumstances, if believed by the jury, guilt may be a logical sequence." *Whart. Cr. Ev. (8th Ed.)* § 756.

As to the defense of an alibi, the burden of making it out was upon the plaintiff in error (*Ackerson v. People*, 124 Ill. 563, 16 N. E. 847) and, in order to maintain it, he

was bound to establish in its support such facts and circumstances as were sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him. *Garrity v. People*, 107 Ill. 162; *Mullins v. People*, 110 Ill. 42. It cannot be said that the defense was made out so clearly and satisfactorily as to be availing against the case made by the state.

It is assigned as error that the court refused to permit the defendant to prove by two witnesses that they had heard Thomas Verhines make threats that he would burn up everything Ridenhour had. We do not regard this ruling as erroneous. Threats of a third person, other than the prisoner on trial, against the victim of the crime charged, are mere hearsay, and are inadmissible. Evidence of this character tends to draw away the minds of the jury from the point in issue, which is the guilt or innocence of the prisoner, and to excite their prejudices and mislead them. 1 Greenl. Ev. §§ 51, 52; *Walker v. State*, 6 Tex. App. 576; *State v. Duncan*, 6 Ired. 236. Such threats of a third person are *inter alios acta*; they are too remote from the inquiry before the jury to be received, and have no legal tendency to establish the innocence of the prisoner. *Alston v. State*, 63 Ala. 178; *State v. Davis*, 77 N. C. 483. It is competent for the defendant to show by any legal evidence that another committed the crime with which he is charged, and that he is innocent of any participation in it, but this cannot be shown by the admissions or confessions of a third person not under oath, which are only hearsay. The proof must connect such third person with the fact,—that is, with the perpetration of some deed entering into the crime itself. There must be proof of such a train of facts and circumstances as tend clearly to point to him, rather than to the prisoner, as the guilty party. "Extrajudicial statements of third persons cannot be proved by hearsay, unless such statements were part of the *res gestae*." *Whart. Cr. Ev. (8th Ed.)* § 225; *Smith v. State*, 9 Ala. 990; *State v. Davis*, supra; *Greenfield v. People*, 85 N. Y. 75; *Thomas v. People*, 67 N. Y. 218; *Owensby v. State*, 82 Ala. 63, 2 South. 764; *State v. Haynes*, 71 N. C. 79; *Rhea v. State*, 10 Yerg. 258; *Com. v. Chabcock*, 1 Mass. 143; *State v. Johnson*, 30 La. Ann. 921; *People v. Murphy*, 45 Cal. 137; *State v. Smith*, 35 Kan. 618, 11 Pac. 908; *State v. May*, 4 Dev. 328; *Wright v. State*, 9 Yerg. 342.

It is assigned as error that the court instructed the jury that "the reasonable doubt the jury are permitted to entertain must be as to the guilt of the accused on the whole of the evidence, and not as to any particular fact in the case." We do not regard the doctrine of the instruction as erroneous. It is in accordance with the rule which we have laid down in a number of cases. *Mul-*

lins v. People, supra; Davis v. People, 114 Ill. 86, 29 N. E. 192; Leigh v. People, 113 Ill. 372; Bressler v. People, 117 Ill. 422, 8 N. E. 62; Hoge v. People, 117 Ill. 35, 6 N. E. 796. There was no error in refusing the defendant's third refused instruction, because instructions given for the state and for the accused required the jury to believe from the evidence, beyond a reasonable doubt, that the defendant willfully and maliciously burned the barn of Ridenhour.

Complaint is made that the court refused to instruct the jury as follows: "If the jury entertain any reasonable doubt as to whether or not the defendant was at his own home or at the scene of the alleged offense at the time such offense was committed, then it is your duty, under the law, to acquit him." Such an instruction was held to be incorrect in Mullins v. People, supra. The reasonable doubt of guilt which will acquit the prisoner when his defense is an alibi is the doubt which arises from a consideration by the jury of all the evidence, "as well that touching the question of the alibi as the criminating evidence introduced by the prosecution." Mullins v. People, supra. In the case at bar, 14 instructions were given for the state, and 18 for the defendant. The jury was instructed in regard to the subject of reasonable doubt in accordance with the principles laid down by this court in Miller v. People, 39 Ill. 457; May v. People, 60 Ill. 119; Connaghan v. People, 88 Ill. 460; Spies v. People, 122 Ill. 1, 12 N. E. 865, and 17 N. E. 808. We see no reason for departing from the views expressed in these cases.

Counsel for plaintiff in error claim that the trial court erred in refusing to give their refused instruction No. 17, which is as follows: "The jury are instructed, as a matter of law, that, when a conviction for a criminal offense is sought on circumstantial evidence alone, the people must not only show, by a preponderance of evidence that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely inconsistent, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any other theory than that of the guilt of the accused; and in this case, if all the facts and circumstances relied on by the people to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, they should acquit him." In instruction No. 13 given for the people, the court told the jury that circumstantial evidence should be of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty." In instruction No. 1 given for the defendant, the court instructed the jury that "the defendant is presumed to be innocent until the contrary appeared by the evidence, and such evidence must be so strong and convincing as to remove every reasonable doubt of his guilt, to the exclusion of every reasonable hypothesis of his

innocence." Irrespective of the question whether refused instruction No. 17 was right or wrong, the defendant could not have been injured by its refusal, in view of the giving of plaintiff's instruction No. 13, and defendant's instruction No. 1, as above quoted, whether the two last-named instructions were correct or not. A defendant cannot complain of the refusal of an instruction if its substance is embodied in instructions which are given, and, in so holding, this court does not necessarily hold such given instructions to be correct. In addition, however, to this consideration, said instruction No. 17 was properly refused, because it is so broad and sweeping in its terms that, if it were given in every criminal case dependent upon circumstantial evidence, it would have a tendency to prevent, in many instances, the conviction of guilty parties. Gannon v. People, 127 Ill. 507, 21 N. E. 525; Whart. Cr. Ev. (8th Ed.) § 10. "What circumstances amount to proof can never be matter of general definition. The legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt." Starkie, Ev. § 79; Otmer v. People, 76 Ill. 149. The circumstances must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis. Com. v. Goodwin, 14 Gray, 55; 1 Greenl. Ev. § 13a. The jury should be satisfied of the defendant's guilt beyond a reasonable doubt, and if there be no probable hypothesis of guilt consistent, beyond reasonable doubt, with the facts of the case, the defendant must be acquitted. Com. v. Costley, 118 Mass. 1; Whart. Cr. Ev. (8th Ed.) § 21. In order to warrant a conviction of crime on circumstantial evidence, the circumstances, taken together, should be of a conclusive nature and tendency, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offense charged. Com. v. Goodwin, supra. It is difficult to define accurately what is a reasonable doubt, but all the authorities agree that such a doubt must be actual and substantial, as contradistinguished from a mere vague apprehension, and must arise out of the evidence introduced. 3 Greenl. Ev. (15th Ed.) § 29, note a; Earl v. People, 73 Ill. 329. The jury may be said to entertain a reasonable doubt when, after the entire comparison and consideration of all the evidence, they cannot say that they feel an abiding conviction to a moral certainty, of the truth of the charge. Com. v. Webster, 5 Cush. 320. Proof "beyond a reasonable doubt" is such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof "to a moral certainty," as distinguished from an absolute certainty. The

two phrases—"proof beyond a reasonable doubt," and proof "to a moral certainty"—are synonymous and equivalent. "Each signifies such proof as satisfies the judgment and conscience of the jury as reasonable men, and applying their reason to the evidence be-

fore them, that the crime charged has been committed by the defendant, and so satisfied them as to leave no other reasonable conclusion possible." *Com. v. Costley, supra.* The judgment of the circuit court is affirmed. Affirmed.

FERRARI et al. v. MURRAY.

(25 N. E. 970, 152 Mass. 496.)

Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 26, 1890.

Exceptions from superior court, Suffolk county; James M. Barker, Judge.

Action by Annibali Ferrari and others against Henry Murray for a balance alleged to be due to plaintiffs on a written contract for the making by them for defendant of a granite monument. Defendant alleged exceptions.

J. L. Eldridge, for plaintiffs. S. Z. Bowman and W. F. Prime, for defendant.

W. ALLEN, J. The defense was a breach of warranty that the monument should be free from all imperfections. The question put by the defendant to the plaintiffs on cross-examination, whether they knew of a particular process described to him of mending and concealing cracks in granite, was immaterial. The plaintiffs' knowledge of a process by which cracks could be concealed had no tendency to prove that cracks existed, and if cracks did exist it was immaterial whether the plaintiffs did or did not know of them or attempt to conceal them. A majority of the court are of opinion that the entry should be, exceptions overruled.

FINDLAY BREWING CO. v. BAUER.

(35 N. E. 55, 50 Ohio St. 560.)

Supreme Court of Ohio. Oct. 31, 1893.

Error to circuit court, Lucas county.

Action for personal injuries by one Bauer against the Findlay Brewing Company. Plaintiff had judgment, and defendant brings error. Affirmed.

Waite & Snider, for plaintiff in error. James E. Pilliod and Ashton H. Coldham, for defendant in error.

MINSHALL, J. The action below was by an employé of the defendant, to recover damages for a personal injury caused, as claimed, by the negligence of the defendant in furnishing an unsafe appliance with which to do the work in which he was employed. The averments are, in substance, that while operating, by the direction of the superintendent of the company, a lift, used for the purpose of elevating barrels and similar packages from a lower to an upper floor, he was injured, without fault on his part, by one of these packages falling back upon him; and that it resulted from the negligent and defective construction of the appliance, of which the defendant had notice, but of which he had no knowledge, and could not have had, in the exercise of ordinary care on his part. Issues were joined upon the averments of the petition as to the defective character of the lift, the negligence of the defendant, and the averment that it happened without fault on the part of the plaintiff. It appeared that the lift or elevator consisted of a broad, heavy, rubber belt, with certain lateral supports and guides of timber, running nearly perpendicular against a board the full width of the belt, and over a pulley just above the upper floor, and around another just below the wash-room floor. To the face of this band were attached two sets of iron hooks or arms, which, as the band revolved, caught the barrels on the under side, and carried them up through an opening in the floor; and as they turned on the upper pulley the barrels fell away by their own weight to the floor above, and left the hooks free to continue their downward movement. The barrels to be elevated were placed upon a skid raised above the lower floor, and inclined towards this revolving band, and the man tending the elevator rolled them, one at a time, against the band, ready for the hooks coming around and upward from the lower pulley to carry them over the pulley above; and, as one barrel was freeing itself from the hooks above, the other set of hooks were about ready to receive the next barrel. While the plaintiff was engaged in so placing the barrels ready to be taken up by the hooks, one of them, a half barrel, after being carried part way up, fell from the hooks, and, striking his hand, then resting on the barrel next to go up, caused

the injury complained of. It was claimed that these hooks or arms were too short, and that in any irregular motion of the belt the barrel or package being lifted would drop out and fall back, and that this was not an infrequent occurrence when, as sometimes happened, the belt became too loose. During the progress of the trial a witness was called by the plaintiff, and stated, in answer to a question, that, some time before he had been employed by the defendant to do the same work, and that, while so employed, a barrel fell back and injured him. The counsel for the plaintiff stated that this was offered for the sole purpose of showing the dangerous character of the machine, and the defendant's knowledge of that fact, and for no other purpose. The court then stated that it would be received for these purposes, and no other, and so instructed the jury at the time. Similar evidence as to the falling back of barrels while the lift was being operated was given by other witnesses, to which the defendant excepted at the time. The jury rendered a verdict in favor of the plaintiff, on which the court, after overruling a motion for a new trial, rendered judgment. The judgment having been affirmed by the circuit court, this proceeding is prosecuted to obtain a reversal of both judgments so rendered.

The only question in the case is as to the admissibility of the evidence offered to show that on former occasions, when the elevator was being operated, barrels and packages fell back, and injured the persons operating it, as in this case. It is claimed to be incompetent on the ground that it raises collateral issues tending to mislead the jury and to surprise the opposite party, by the introduction of evidence for which he could not have been prepared by the nature of the issue. The rule relied on is thus stated by Greenleaf: "The evidence offered must correspond with the allegations, and be confined to the point in issue." Greenl. Ev. § 51. And he adds, in the following section: "This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal matter of fact in dispute." The authorities on the question are conflicting. The courts of Massachusetts and some of the other states hold that such evidence is not within the issue, but collateral to it, and should be rejected. *Collins v. Dorchester*, 6 Cush. 396; *Aldrich v. Pelham*, 1 Gray, 510; *Phillips v. Town of Willow*, 70 Wis. 6, 34 N. W. 731. But reason and the weight of authority are the other way. The rule, as stated by Greenleaf, excludes only those facts "which are incapable of affording any reasonable presumption or inference as to the principal matter or fact in dispute." So that a fact cannot be said to be collateral to the issue if, when established, it tends to prove or disprove the principal fact in dis-

pute. In this case a number of principal facts were in dispute. Among these were the defectiveness of the machine, and the defendant's knowledge of that fact, as well as his negligence in the premises. If the evidence objected to tended to prove either of these facts, there was no error in its admission. There is no rule of evidence which requires that what is offered should be relevant to every issue in the case; it may be relevant to one, and irrelevant to another. No party can, as a rule, prove his case *uno flatu*. He is compelled, in the nature of things, to proceed step by step; and it not infrequently happens that what is competent for one purpose is not for another. The mixed character of the evidence does not, however, render it wholly incompetent. The evidence in such case is admitted with a direction from the court to the jury as to how it is to be applied, on what issues it is to be considered, and on what not, as was done in this case.

On reason, it seems plain that evidence as to how this lift or elevator behaved on former occasions—that at other times, when being operated by other persons, barrels being lifted had fallen, and injured those operating it, or had simply fallen back, the conditions remaining substantially the same—tended to prove some vice in its construction that rendered its operation dangerous, and that the company knew or should have known the fact. Inspection itself may indicate some defect in a machine, affecting its safety or usefulness; but, as is most usually the case, its defective character, whatever it may be, is more clearly observed in its operation. Experiment is the final and most conclusive test of its safety, as well as of its usefulness; and the fact that the carefulness of the party operating the machine may be involved in each instance may affect the weight of the evidence, but not its admissibility, as such a limitation would exclude the result of every experiment offered in evidence, which would amount to a *reductio ad absurdum*. The defectiveness of the lift, and the company's knowledge of it, would not, however, alone constitute actionable negligence. The character of the machine and the employer's knowledge being established, it still remains a question of fact whether, under all the circumstances, a case of actionable negligence has been made out. That which caused the danger may have been irremediable, and it is no violation of duty by an employer to put one in his employ at the operation of a dangerous machine, if the employé is fully informed as to its character, and voluntarily accepts the employment. Whenever force is applied to machinery there is more or less danger to those operating it; so that the duty of the employer towards his employé is not to furnish a perfectly safe machine, but one as safe as can be provided in the exercise of ordinary care and prudence.

Whether the employer is negligent in this regard does not depend solely upon the fact that the machine is known by him to be a dangerous appliance, but whether, with such knowledge, he neglected to do what a person of ordinary care could and would have done under such circumstances. It was, however, incumbent on the plaintiff, in making out his case, to show the dangerous character of the machine and the company's knowledge, as well as its negligence; and, while the evidence was not competent to prove negligence, it did tend, as we have shown, to prove the other facts, and was therefore admissible. As said by the judge delivering the opinion in *Darling v. Westmoreland*, 52 N. H. 403: "The evidence to prove several independent propositions or distinct facts may be of different kinds, and drawn from different sources." If evidence offered be relevant to any issue in the case, it is admissible, however incompetent it may be upon other issues. Commenting on the rule that confines the evidence to facts put in issue by the pleadings, and excludes collateral issues, *Doe, J.*, in the case just cited, says: "This rule merely requires the evidence to be relevant. It merely excludes what is irrelevant. It is a rule of reason, and not an arbitrary or technical one, and it does not exclude all experimental knowledge." And it was there held that, on the question whether a pile of lumber was likely to frighten horses, evidence is admissible to show that horses passing it were or were not frightened by it. In *McCaragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812, an action to recover damages for an injury sustained by the plaintiff while working at a machine in the employ of the defendant, a person who had previously been injured while working the machine in the capacity of the plaintiff was asked, "How did the injury occur to you?" and he answered, "It jumped out of the socket in the same way." The evidence was held to be relevant and competent as bearing upon the question of the condition of the machinery; and the court said that, while the decisions are not in entire harmony on that question, such is the rule recognized in that state. And so in *Morse v. Railway Co.*, 30 Minn. 465, 471, 16 N. W. 358, which was an action by an employé of defendant to recover for an injury caused by its negligence in permitting its tracks to be and remain out of order, such evidence was held competent. The court said: "It is, of course, not competent for the purpose of showing independent acts of negligence, but we think on principle it is clearly admissible when it tends to show the common cause of these accidents is a dangerous or unsafe thing. It would be certainly competent to prove by an expert that, at a time, either before or after the accident, when the instrument claimed to have caused it was in the same condition as when the ac-

cident complained of occurred, he examined and experimented with it, and found it capable of producing like results. Hence there seems no reason for excluding ordinary experience, when confined within the same limits and for the same purpose. These facts are in the nature of experiments to show the actual condition of the instrument. Upon any issue as to the condition or safety of any work of human construction designed for practical use, evidence showing how it has served when put to the use for which it was designed would seem to bear directly upon the issue. It is sometimes objected that this presents new and collateral issues of which a defendant has no notice. In a certain sense every item of evidence material to the main issue introduces a new issue; that is, it calls for a reply. In no other sense does it make a new issue. Its only importance is that it bears on the main issue, and, if it does, it is competent." We have quoted thus fully from the opinion in this case because it seems to set forth clearly and fully the reasons for the admission of such evidence, and to answer every objection that can be made. The reasoning in the Massachusetts cases cited above, and relied on by the plaintiff in error, has generally been regarded as unsound; and, for this reason, the decisions have not generally been followed as pre-

cedents by the courts of the other states. *Osborne v. City of Detroit*, 32 Fed. 36, where it is said, referring to the Massachusetts cases, the weight of authority is decidedly the other way. *City of Chicago v. Powers*, 42 Ill. 169, 173; *Moore v. City of Burlington*, 49 Iowa, 136; *Walker v. Westfield*, 39 Vt. 246, 251. It is here said that "a fact that illustrates, as by an experiment, the condition of the subject-matter of the issue in controversy, is not collateral to that issue, but is direct evidence bearing upon it." *City of Aurora v. Brown*, 12 Ill. App. 122; *Darling v. Westmoreland*, 52 N. H. 401. Here the Massachusetts cases are considered and declared unsound. *City of Delphi v. Lowery*, 74 Ind. 520, contains an elaborate review of the cases. *Cook v. New Durham* (N. H.) 13 Atl. 650; *Kent v. Town of Lincoln*, 32 Vt. 591; *Piggot v. Railway Co.*, 3 C. B. 229. As the evidence objected to tended to prove that the lift had in it a vice, making it dangerous to operate, and that the company had notice of this from its previous behavior, there was no error in admitting the evidence, with a direction to the jury that it was to be confined to these purposes, and could not be considered on the question of the defendant's negligence in the premises. Judgment affirmed.

SPEAR and BURKET, JJ., dissent.

PINNEY v. JONES.

(30 Atl. 762, 64 Conn. 545.)

Supreme Court of Errors of Connecticut. July 9, 1894.

Appeal from superior court, New Haven county; Prentice, Judge.

Action by Maria W. Pinney, executrix of the estate of Charles H. Pinney, deceased, against Emily Jones to foreclose a mortgage. From a decree for plaintiff, entered on the report of the state referee, defendant appeals. Affirmed.

V. Munger, for appellant. William H. Williams, for appellee.

TORRANCE, J. This is an action brought to foreclose a mortgage made to secure a note for sixteen hundred dollars by the defendant, Emily Jones, to Charles H. Pinney, now deceased. The defendant claimed to have paid upon said note to Pinney, during his lifetime, the sum of \$1,500, and whether this was true or not was the main fact in dispute between the parties. The case was tried before the Honorable Elisha Carpenter, as state referee. For the purpose of showing her ability to make such payment, the defendant offered evidence to prove, and claimed she had proved, that at the time when she bought the mortgaged premises, in March, 1892, she had in her possession the sum of \$1,500, in addition to the sum of \$500 which she had paid on account of said purchase; that this sum of \$1,500 was in a package in her house; that she moved into the house upon the mortgaged premises in April, 1892, and two or three weeks thereafter, in the presence of her daughter Cora, who was produced as a witness, she counted said \$1,500, and, after counting the same, deducted \$15 therefrom, and placed the remainder in a tin box, and placed the box, with the money in it, in a jar, and sealed up the jar with putty; and that, after leaving the jar upon a shelf to dry for two or three days, she and her husband, who was produced as a witness, buried this jar in the cellar near the bottom of the stairs, covered it over, and placed a paint barrel over the spot where the jar was buried. While Mrs. Jones was upon the witness stand, her counsel offered to prove by her that, some time within two months after the money had been counted as aforesaid, Mrs. Jones requested her daughter Cora to go with her to the said place where the money was then buried, and that thereupon Cora and she went to the spot from the sitting room above; that Mrs. Jones then and there removed the paint barrel, and told Cora that the money was in a pot in the ground, and that she wanted her to know where it was, "for if she should die she wanted her to know about it." The finding states: "It was not claimed that the earth was removed from over the jar in which the money was claimed to have been placed, or that the jar or other thing, in which it is now

claimed the money then was, was so exposed or attempted to be exposed to view. The plaintiff's counsel objected to the admission in evidence of the conversation between the said Emily Jones and her daughter Cora upon this occasion, and it was excluded; to which ruling the defendant duly excepted." Mrs. Jones thereafter upon this point testified, without objection, as follows: "Cora went with me down cellar; went down the cellar steps to the left hand of the stairs, just as you go down. I showed her the money. I took the paint barrel, and moved it around like this [illustrating], and pointed out to her where the money was concealed. Then I set the barrel back on the same spot I had removed it from. Then we went upstairs. That she, Cora, was the only person, so far as she knew, besides her husband, that ever knew or was shown where the money was." The daughter Cora also testified, without objection, to her going down in the cellar with her mother, and being shown where the money was concealed, substantially as her mother had done. The referee found that said claimed payment of \$1,500 had not been made. To the report made by the referee the defendant filed a remonstrance, setting up as the ground of it the action of the referee in excluding the conversation aforesaid between Cora and her mother. He further set up therein that the plaintiff claimed that Mrs. Jones did not have said sum of \$1,500 at any time after 1891, and that her entire story with reference to the possession of said sum was false. The plaintiff demurred to the remonstrance, the court sustained the demurrer, judgment was rendered for the plaintiff, and the defendant appealed.

This appeal presents but a single question, and that is whether the statement made by Mrs. Jones to her daughter was admissible. It is apparent that the defendant obtained the benefit of everything else claimed by her except this statement. She was allowed to testify fully to her acts and conduct in going into the cellar, and pointing out the place where she claimed the money was concealed, and from all this Cora understood that the money was there buried. She says, indeed, that she there showed Cora the money; but from her own testimony, and from other parts of the record, it is clear that all she meant by this was that she showed her the place where the money was concealed. Essentially then, in this view of the matter, all that was excluded was her statement of her reason for having Cora know where the money was concealed; and it is perhaps questionable whether, even on the defendant's view of the case, the exclusion of that was error (*Russell v. Frisbie*, 19 Conn. 205-211); and, if it was, the case might perhaps be disposed of on the ground that the error did not harm the defendant. But, as we think the evidence was rightly excluded, we prefer to rest the decision upon that ground,

rather than upon the one suggested. As we have said, what was done in the cellar was, without objection, fully testified to by both Mrs. Jones and Cora. What was said was excluded; and that was, in substance, a statement by Mrs. Jones that the money was buried there in a jar, and that she wanted to have Cora know, for a reason then stated, where it lay. The defendant strenuously insisted that this statement characterized the act of Mrs. Jones in going to the cellar, and doing what she did there, and was admissible in corroboration of her claim to the possession of the money, and as part of the *res gestæ*; and in support of these claims she relies mainly upon the case of *Card v. Foot*, 56 Conn. 369, 15 Atl. 371. The general rule is that a party cannot give in evidence his own declarations in his own favor, made in the absence of the other party; but there is one well-recognized exception to this rule, where such declaration is part of what, for want of a better name, is called the "*res gestæ*." *Kilburn v. Bennett*, 3 Metc. (Mass.) 199; *Stirling v. Buckingham*, 46 Conn. 461. The nature and limits of this exception are tolerably well defined, although the application of the rule embodied in the exception, in particular cases, is sometimes attended with difficulty. That rule is thus stated in *Starkie on Evidence* (10th Ed., 466-687): "In the first place, an entry or declaration accompanying an act seems, on principles already announced, to be admissible evidence in all cases where a question arises as to the nature or quality of that act. Indeed, whenever an entry or declaration reflects light upon, or qualifies, an act which is relevant to the matter in issue, and is evidence in itself, it becomes admissible as part of the *res gestæ*, if it be contemporaneous with the act." According to this writer, before a written declaration made by a party in his own favor can be admissible as part of the *res gestæ*, the act which it characterizes, and of which it forms a part, must be itself admissible in evidence in the case; and so are the authorities. "Where an act done is evidence *per se*, a declaration accompanying that act may well be evidence, if it reflects light upon or qualifies the act. But I am not aware of any case where the act done is, in its own nature, irrelevant to the issue, and where the declaration *per se* is inadmissible, in which it has been held that the union of the two has rendered them admissible." *Coltman, J.*, in *Wright v. Tatham*, 7 Adol. & E. 361; *Hotel Co. v. Manning*, 1 Ir. R. Com. Law, 125. "*Res gestæ* are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." *Stirling v. Buckingham*, 46 Conn. 461. "When the act of a party may be given in evidence, his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one trans-

action, and so as to derive credit from the act itself, are admissible in evidence. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporaneous with it, and derive some degree of credit from it." *Lund v. Tyngsborough*, 9 Cush. 36. It follows that if the act of Mrs. Jones irrespective of the accompanying statement, was not in itself admissible in evidence, then the statement was inadmissible; and the fact that the act was admitted without objection does not make the accompanying statement legal evidence. The question, then, is whether what Mrs. Jones did upon the occasion in question was *per se* admissible as evidence in the case, and we are clearly of the opinion that it was not. It was offered and received as an act tending to show that she then had this money in her possession; but, rightly considered, it was not in any proper sense, within the meaning of the rule in question, an act or transaction at all. It is true there were the physical acts of going downstairs, and over to where it was supposed the money was buried, and the moving of the paint barrel, and the pointing to or otherwise indicating a certain spot of earth, but that was all. There is nothing in all this tending in the least to show that the money, or the receptacle which had contained it, was then in the spot pointed out. For aught that appears, all that Mrs. Jones could then know or say about the money was, not that it was then there, but that she had put it there some time before, and believed it was there then; and neither she nor Cora then knew, or could know, that the money was then in the possession of Mrs. Jones, or even in existence at all. Nothing whatever was done by either of them with, or with reference to, the money or the jar; they were not seen, handled, nor dealt with in any manner whatsoever. Essentially, the so-called "act" or "acts" of Mrs. Jones are but statements or declarations that she had buried the money there some time before, and believed it was there then.

Suppose Mrs. Jones and her daughter had remained up-stairs, and Mrs. Jones had said to Cora: "I put the money you saw me count the other day into a tin box, and the box into a jar, and buried the jar in the cellar to the left hand of the stairs, just as you go down, and put a paint barrel over the spot where they now are. I tell you this, so that in case of my death you will know where to find the money,"—could any one successfully contend that such a statement was admissible? Clearly not. It would be a mere naked statement or declaration of a past transaction in the party's own favor, and would clearly fall within the general rule of exclusion. But the supposed case does not differ essentially from the real case,—for in the one Mrs. Jones indicates and describes the place where she buried the money by words,

and in the other she indicates and describes it by acts; and the result of both is but a statement or declaration to Cora that the money had been buried there, and that Mrs. Jones believed it was there at that time. That in the one case this information is conveyed to Cora by words, and in the other by acts, can make no difference; in both the result is only and solely information conveyed. The difference between an act of the kind here claimed and the acts done in *Russell v. Frisbie*, 19 Conn. 205, and *Card v. Foot*, 56 Conn. 369, 15 Atl. 371, is quite obvious. In the former case the defendant was allowed to prove what he said to one Hempstead, when he handed to him for safe-keeping the ship's papers, which defendant had taken from a vessel of his in order to revoke the authority of her captain; in the latter, the plaintiff was allowed to prove what she said to Miss Lyon when she delivered to her for safe-keeping the package containing the plaintiff's bonds. In both of these cases the declarations allowed, accompanied, grew out of, formed part of, and of course qualified and characterized, acts which themselves were clearly admissible to prove the then possession and disposition of the ship's papers in the one case, and the bonds in the other. The acts were not in effect mere dec-

larations, but acts of possession and disposition in a real and true sense. In the case at bar this is not so. There the so-called "act" is itself, in effect, but a statement or declaration. Nothing was transacted, nothing was done, nothing was transpiring, evident to any witness, which could confirm the declarations excluded, or by which, upon cross-examination or otherwise, the truth of those declarations could be tested. "Declarations accompanying acts are a wide field of evidence, and to be carefully watched," said Williams, J., in *Queen v. Bliss*, 7 Adol. & E. 556, a good many years ago; and we think this "field" should still be carefully watched. The exceptions to the general rule excluding statements made by one in his own favor ought to be strictly limited; certainly the scope of the exception in question ought not to be extended to a case like the one at bar. For the reasons given, the claimed act or acts of Mrs. Jones were not admissible, and should, and on objection probably would, have been excluded. They were, however, admitted, and of this the defendant does not, and cannot justly, complain; but, on objection, the statement accompanying the claimed act was excluded, and we think was rightfully excluded. There is no error. The other judges concurred.

VICKSBURG & M. R. CO. v. O'BRIEN et al.¹

(7 Sup. Ct. 118, 119 U. S. 99.)

Supreme Court of the United States. Nov. 1, 1886.

In error to the circuit court of the United States for the Southern district of Mississippi.

Wm. L. Nugent, E. M. Johnson, Geo. Hoadley, and Edw. Coeston, for plaintiff in error. T. C. Catchings, for defendants in error.

HARLAN, J. This action was brought by Mary E. O'Brien and her husband, John J. O'Brien, to recover damages sustained in consequence of personal injuries received by the wife in September, 1881, while a passenger upon the Vicksburg & Meridian Railroad. The declaration alleges that the company "so carelessly, negligently, and unskillfully constructed and maintained its railroad track, engine, and cars, and so carelessly, negligently, and unskillfully conducted itself in the management, control, and running of the same," that the car in which Mrs. O'Brien was seated as a passenger was thrown from the railroad track and overturned, whereby she was seriously injured. There was a verdict and judgment for \$9,000 in favor of the plaintiffs.

1. At the trial the plaintiffs offered to read to the jury the deposition of a physician, and did read the first, second, and third interrogatories propounded to him, and the answers thereto. Responding to the first and second interrogatories, he stated, among other things, that his attendance upon Mrs. O'Brien commenced on the sixteenth of September, 1881; that he found her suffering extreme pain, and in a very nervous condition, resulting a few hours before from a railroad accident on defendant's road; that such was the cause of her injuries he knew from her own answers, from the statement of her brother-in-law, and from attending others who were on the train with her. The third interrogatory and answer were as follows: "(3) Look on the accompanying statement, dated November 26, 1881, and state if it was written by you at the date it bears, for what purpose it was written, and to whom it was delivered. Does the statement represent, substantially and correctly, Mrs. O'Brien's condition as it appeared when you first saw her, and as it continued up to November 26, 1881? Answer. I have looked upon the statement referred to, which was written by myself, at Mr. O'Brien's request, at the date mentioned, when he was about to take his wife away from here to his home in New Orleans, and was intended to convey an idea of how she was when I was called to see her, and what her condition was when she

left my charge; and, in my opinion, I correctly stated her condition at times referred to."

The written statement referred to in the interrogatory was signed by the witness, and attached to his deposition as an exhibit. It was addressed to Mr. O'Brien, and sets forth, with much detail, the nature of the injuries received by the wife, and their effect upon her bodily and mental condition. It also embodied an expression of the witness' opinion as to the probable length of time within which she might recover from her injuries. The plaintiff, before reading the remaining interrogatories and answers, offered to read this statement to the jury as evidence. The company objected upon these grounds: That it was not made by the witness under oath, and in defendant's presence, or with its knowledge and consent; that it was hearsay evidence, and therefore wholly incompetent; and that, in any event, it could only be referred to by the witness to refresh his recollection. The court overruled the objection, and permitted the statement to be read in evidence, the defendant taking an exception thereto, which was allowed. The remainder of the deposition was then read to the jury.

We are of opinion that this ruling cannot be sustained upon any principle recognized in the law of evidence. The authorities are uniform in holding that a witness is at liberty to examine a memorandum prepared by him, under the circumstances in which this one was, for the purpose of refreshing or assisting his recollection as to the facts stated in it. But there are adjudged cases which declare that unless prepared in the discharge of some public duty, or of some duty arising out of the business relations of the witness with others, or in the regular course of his own business, or with the knowledge and concurrence of the party to be charged, and for the purpose of charging him, such a memorandum cannot, under any circumstances, be admitted as an instrument of evidence. There are, however, other cases to the effect that, where the witness states, under oath, that the memorandum was made by him presently after the transaction to which it relates, for the purpose of perpetuating his recollection of the facts, and that he knows it was correct when prepared, although after reading it he cannot recall the circumstances so as to state them alone from memory, the paper may be received as the best evidence of which the case admits.

The present case does not require us to enter upon an examination of the numerous authorities upon this general subject; for it does not appear here but that at the time the witness testified he had, without even looking at his written statement, a clear, distinct recollection of every essential fact stated in it. If he had such present recollection, there was no necessity whatever for reading that paper to the jury. Applying, then, to the case the most liberal rule announced in any of the authorities, the ruling by which the plaintiffs

¹ Dissenting opinion of Mr. Justice Field omitted.

were allowed to read the physician's written statement to the jury as evidence, in itself, of the facts therein recited, was erroneous.

It is, however, claimed, in behalf of the plaintiffs that in his answers to other interrogatories the physician testified, apart from the certificate, to the material facts embodied in it, and that, therefore, the reading of it to the jury could not have prejudiced the rights of the defendant, and, for that reason, should not be a ground of reversal. We are unable to say that the defendant was not injuriously affected by the reading of the physician's certificate in evidence. It is not easy to determine what weight was given to it by the jury. In estimating the damages to be awarded, in view of the extent and character of the injuries received, the jury, for aught that the court can know, may have been largely controlled by its statements. The practice of admitting the unsworn statements of witnesses, prepared, in advance of trial, at the request of one party, and without the knowledge of the other party, should not be encouraged by further departures from the established rules of evidence. While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party. *Smiths v. Shoemaker*, 17 Wall. 630, 639; *Deery v. Cray*, 5 Wall. 795; *Moores v. National Bank*, 104 U. S. 630; *Gilmer v. Higley*, 110 U. S. 50, 3 Sup. Ct. 471.

2. At the trial below plaintiffs introduced one Roach as a witness, who, during his examination, was asked whether he did not, shortly after the accident, have a conversation with the engineer having charge of defendant's train at the time of the accident about the rate of speed at which the train was moving at the time. To that question the defendant objected, but its objection was overruled, and the witness permitted to answer. The witness had previously stated that, on examination of the track after the accident, he found a cross-tie or cross-ties under the broken rail in a decayed condition. His answer to the above question was: "Between ten and thirty minutes after the accident occurred I had such a conversation with Morgan Herbert, the engineer having charge of the locomotive attached to the train at the time of the accident, and he told me that the train was moving at the rate of eighteen miles an hour." The defendant renewed its objection to this testimony by a motion to exclude it from the jury. This motion was denied, and an exception taken. As bearing upon the point here raised it may be stated that, under the evidence, it became material—apart from the issue as to the condition of the track—to inquire whether, at the time of the accident, (which occurred at a place on the line where the rails in the track were,

according to some of the proof, materially defective,) the train was being run at a speed exceeding 15 miles an hour. In this view, the declaration of the engineer may have had a decisive influence upon the result of the trial.

There can be no dispute as to the general rules governing the admissibility of the declarations of an agent to affect the principal. The acts of an agent, within the scope of the authority delegated to him, are deemed the acts of the principal. Whatever he does in the lawful exercise of that authority is imputable to the principal, and may be proven without calling the agent as a witness. So, in consequence of the relation between him and the principal, his statement or declaration is, under some circumstances, regarded as of the nature of original evidence; "being," says Phillips, "the ultimate fact to be proved, and not an admission of some other fact." 1 Phil. Ev. 381. "But it must be remembered," says Greenleaf, "that the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all; and therefore it is not necessary to call the agent to prove it; but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it." 1 Greenl. Ev. § 113. This court had occasion in *Packet Co. v. Clough*, 20 Wall. 540, to consider this question. Referring to the rule as stated by Mr. Justice Story in his treatise on Agency (section 134), that "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestæ*," the court, speaking by Mr. Justice Story, said: "A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ*."

We are of opinion that the declaration of the engineer, Herbert, to the witness Roach was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. It is true that, in view of the engineer's experience and position, his statements under oath, as a witness, in respect to

that matter, if credited, would have influence with the jury. Although the speed of the train was, in some degree, subject to his control, still his authority, in that respect, did not carry with it authority to make declarations or admissions at a subsequent time, as to the manner in which, on any particular trip, or at any designated point in his route, he had performed his duty. His declaration, after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of 18 miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestæ*,—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestæ* simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was ad-

missible evidence against the company. And yet the circumstance that it was made between 10 and 30 minutes—an appreciable period of time—after the accident, cannot, upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it will follow that the declarations of the engineer, if favorable to the company, would have been admissible in its behalf as part of the *res gestæ*, without calling him as a witness,—a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals. These views are fully sustained by adjudications in the highest courts of the states.

We deem it unnecessary to notice other exceptions taken to the action of the court below.

This case was decided at the last term of this court, and Mr. Justice Woods concurred in the order of reversal upon the grounds herein stated.

For the errors indicated the judgment is reversed, and the cause is remanded for a new trial, and for further proceedings consistent with this opinion.

Mr. Chief Justice WAITE, Mr. Justice FIELD, Mr. Justice MILLER, and Mr. Justice BLATCHFORD, dissent.

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OHIO & M. RY. CO. v. STEIN.

(31 N. E. 180, 32 N. E. 831, 133 Ind. 243.)

Supreme Court of Indiana. May 14, 1892.

Appeal from circuit court, Jefferson county; W. T. Friedly, Judge.

Action by William Stein against the Ohio & Mississippi Railway Company to recover for personal injuries. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

McMullen, Johnston & McMullen, Ramsey, Maxwell & Ramsey, and John McGregor, (Edward Barton, of counsel,) for appellant. Korbly & Ford, A. G. Smith, and Lincoln Dixon, for appellee.

ELLIOTT, C. J. The appellee seeks to recover damages against his employer, the appellant, for injuries alleged to have resulted to him from the negligence of the employer in failing to furnish him with safe appliances for use in the performance of the duty required of him by the service in which he was employed. The injury resulted from the collision of the car upon which the appellee was performing the duties of a brakeman with another part of the same train, which had been detached for the purpose of making what is commonly called "a running switch." The car upon which the appellee was a brakeman was a platform car, laden with large and heavy blocks of stone, and the appellee was at the front end of the car, endeavoring to check it by using the brake. Discovering that he was unable to do so, and that a collision was inevitable, he attempted to make his way to the rear of the car, but his feet were caught between two heavy stones and crushed. In the first paragraph of the complaint it is alleged that the accident was caused by the negligence of the appellant in failing to repair a cylinder cock of the engine, which had been blown out some time before the accident, and that the failure to replace the cylinder cock rendered it impossible for the engineer to get that part of the train which the car on which the appellee was standing was following out of the way, and this brought on the collision. The second paragraph of the complaint charges that the brake on the car was defective, and substantially repeats the allegations of the first as to appellant's negligence in failing to replace or repair the cylinder cock of the engine. The third paragraph is based upon the negligence of the appellant in regard to the brake, but it also alleges that there was some defect in the engine, which was unknown to the appellee. As no question is made upon the complaint, we have given only a general outline of its allegations, which are full and explicit.

The question to which the appellant's counsel devote the principal part of their argument arises on the ruling of the trial

court in permitting the appellee to give in evidence the declarations of the engineer in charge of the locomotive which was drawing the train on which the appellee was acting as a brakeman. The appellee's counsel argue with earnestness that even if there was error in admitting the evidence, it was harmless. This contention makes it necessary to dispose of the question as to the effect of the evidence before considering its competency, for, if it was harmless, the judgment cannot be reversed for admitting it, although it was incompetent. We are satisfied that, if the evidence be conceded to be incompetent, the error in admitting it was not harmless. The appellee's counsel assume that the error was a harmless one, even if the incompetency of the evidence be conceded, for the reason that the declarations of the engineer were proved by witnesses called to prove that he had made statements out of court contradicting those made by him on the witness stand. This position is untenable. The witnesses by whom the engineer was contradicted were impeaching witnesses, and their testimony went to his credibility; but it did not prove, nor tend to prove, the principal fact. Impeaching testimony goes only to the credibility of a witness, and it cannot be given any force as evidence in proof or disproof of a disputed fact, except in so far as it bears upon the credibility of the witness it tends to impeach. In *Seller v. Jenkins*, 97 Ind. 430-436, it was said of impeaching evidence that "such evidence does not tend to establish the truth of the matters embraced in the contradictory evidence; it simply goes to the credibility of the witness." Other cases assert a similar doctrine. *David v. Hardy*, 76 Ind. 272; *Hicks v. Stone*, 13 Minn. 434, (Gil. 398.)

The position assumed by appellee's counsel, that, as the facts which the declarations of the engineer tended to prove were established by other testimony, the ruling in admitting evidence of such declarations, even if erroneous, was harmless, cannot be maintained. There may be cases where the facts are so fully and conclusively proven by other testimony that the appellate tribunal will not reverse the judgment because incompetent evidence to the same facts is admitted; but this is not such a case, for here the evidence was as to a material point, and it cannot be justly said that the facts which the declarations tended to prove were established by uncontradicted evidence.

We cannot, it is evident from what we have said, avoid a decision of the principal question upon the ground that, if the evidence was incompetent, it was not prejudicial. We are required to decide whether the evidence was competent, because its material character creates the presumption that it was probably prejudicial. The rule is well settled that, where evidence of an influential character is erroneously allowed

to go to the jury, it will be presumed to have prejudiced the objecting party, and, unless this presumption is rebutted, the judgment must be reversed. See authorities cited in Elliott's Appellate Procedure, § 594, note 2. It is an elementary rule that the declarations of an agent are not admissible against the principal unless they were made while the agent was conducting some transaction for the principal, or in a matter where the agent's act is part of the *res gestæ*. If the declarations of the appellant's engineer were not part of the *res gestæ*, there was judicial error in permitting them to be given in evidence. It can hardly be affirmed that there is a general rule which will fit all cases, for each case is dependent upon particular facts. It is, perhaps, safe to declare that, where the declarations of the agent are made to the person whose interests are directly involved, at a place where the transaction or occurrence happened, so near the occurrence or transaction in point of time as to be justly and reasonably regarded as part of it, refer directly to the transaction or occurrence, and are not narratives of the past, they are ordinarily to be regarded as part of the *res gestæ*. If the declarations are made at a different place, and are separated from the occurrence or transaction by such an interval of time as requires the inference or conclusion that they were not part of the act, transaction, or occurrence, then, under all the well-reasoned cases, they are not part of the *res gestæ*, and cannot be given in evidence against the principal. There is wide diversity of opinion and stubborn conflict as to how great an interval of time must elapse between the occurrence and the declarations in order to deprive a party of the right to give them in evidence, but we think our general statement is supported by the weight of authority. The difficulty, as we have indicated, is not so much in formulating general statements as in determining under what phase or branch of a general rule the particular case falls. That is here the difficulty, for, while we are satisfied that our general statement is correct, we have found it no easy task to determine under what branch or phase of it this case belongs. The question as to the competency of the declarations of the engineer has two branches, for there is one branch founded on specific objections interposed to the testimony, and another upon a motion to strike out part of the testimony. It will conduce to clearness to consider each branch separately, although both depend upon the effect and application of the rule relating to the competency of evidence as part of the *res gestæ*.

The appellee testified as a witness in his own behalf, and, after giving an account of the collision, and the manner in which he was injured, he said: "In the mean time I was getting up. I went to walk. I went to step, and when I stepped on this foot I

fell. That was the first time I knew I was hurt. I reached down in the dark, and felt that my foot was all cut. I crawled over to the car and sat down. About that time Mr. Brumley, the engineer, came to me with his torch. I was going on like I suppose anybody would when he was hurt. He says, 'That is too bad, Bill.' I said, 'Yes.' He said: 'What was the matter, Bill? Didn't you understand the signal, or couldn't you get out of the road?'" At this point an objection was stated, and then followed questions and answers. Some of the questions, as indicated by the stenographer's report, were interposed by Mr. McMullen, counsel for the appellant. The statements elicited by the statements addressed to the witnesses are, in substance, these: From the time the collision occurred until the engineer came to the appellee was "not over a minute or two." The engineer left his engine, and walked back to the car where the appellee was. The engine had "gone down the track" between two and three hundred feet ahead of the car on which the appellee was at work, but when the engineer left the engine it was about a car's length from the car on which the appellee was injured, and, as the witness expressed it, "the engine was stopped, and the collision was all over," when the engineer reached the appellee, who had at that time crawled from the end of the car to the center, and was holding his foot, and moaning. It appears from this evidence that the direct collision was over and the injury done at the time the engineer reached the appellee, but that the car on which the appellee was sitting was still at the place where the injury was received. It also appears that there was an interval of time, although a very brief one, in which the engineer walked from his engine to the appellee after the engine had been stopped. The appellee, as we have seen, estimates the time at not more than one or two minutes, so that, while there was an interval of time between the actual injury and the declarations, it was a brief one; but, brief as it was, it was sufficient to allow the engine to traverse a short distance—a car's length—from the place where the engine was stopped to the place where the car on which the appellee was sitting was standing. The statement of the witness that the engine had "gone down the track two or three hundred feet from where it was when the collision took place" does not mean that the engine was that far from the appellee's car when it was stopped, but what it means is, as the record shows, that the engine and the car on which the appellee was stationed, although detached, continued in motion for that distance after the collision took place, so that the engineer did not walk that distance; on the contrary, he walked only the distance between the car and the engine, and that, as the witness says, was a car's length. We

have, therefore, a case where there was a very brief interval between the collision and the declarations, and one in which the engineer walked only a few feet after he stopped—he had checked—his engine, back to the car on which the injured person was sitting, moaning in pain.

We have no disposition to extend the rule respecting the competency of declarations of an agent upon the ground that they constitute a part of the *res gestæ*, for we are satisfied that an enlargement of the rule would very likely make it an instrument of evil. But, on the other hand, an undue limitation of the rule might often prevent a party from availing himself of evidence to which he was entitled, and which would aid in establishing the truth. If we can ascertain the rule as our decisions declare it, we shall deem it our duty to apply it without extending or narrowing it. It is necessary to examine the decided cases in order to obtain the means of solving the vexed question which faces us, and we begin this work by a reference to the cases which declare the general doctrine. One of the earliest of our cases is that of *Bland v. State*, 2 Ind. 608, wherein it was said: "It has been decided that it is not competent for a prisoner indicted for murder to give in evidence his own account of the transaction, related immediately after it occurred, though no third person was present when the homicide was committed." The case from which we have quoted cites as authority for the conclusion which it declares the case of *State v. Tilly*, 3 Ired. 424, wherein it was said: "Unless the declarations form a part of the transaction, they are not receivable in evidence." The case of *Bland v. State*, supra, has often been cited and approved, so that the doctrine of that case, in so far as it asserts that the declarations must be part of the occurrence, act, or transaction, is to be accepted as the law of this transaction. The doctrine of that case, as we have stated it, is the prevailing one, for it is sanctioned by many able courts, state and federal. *Railroad Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118; *Durkee v. Railroad Co.*, 69 Cal. 533-535, 11 Pac. 130; *State v. Pomeroy*, 25 Kan. 349; *Railroad Co. v. Coleman*, 28 Mich. 440-446; *Mayes v. State*, 64 Miss. 329, 1 South. 733; *Southerland v. Railroad Co.*, (N. C.) 11 S. E. 189; *Martin v. Railroad Co.*, 103 N. Y. 626, 9 N. E. 505; *Waldele v. Railroad Co.*, 95 N. Y. 274; *Lane v. Bryant*, 9 Gray. 245; *Luby v. Railroad Co.*, 17 N. Y. 131; *Williamson v. Railroad Co.*, 144 Mass. 148, 10 N. E. 790; *Railroad Co. v. Becker*, 128 Ill. 545, 21 N. E. 524; *Railroad Co. v. Mara*, 26 Ohio St. 185; *Adams v. Railroad Co.*, 74 Mo. 553; *Railroad Co. v. Womack*, 84 Ala. 149, 4 South. 618. The general doctrine that the declarations must be part of the act or occurrence is asserted without substantial diversity of opinion by the text writers. *Abbott*, Tr. Ev. 51; *Woods*, Pr. Ev. 469; 1

Whart. Ev. (3d Ed.) § 259; *Taylor*, Ev. (8th Eng. Ed.) § 602; 1 *Rice*, Ev. 375.

We assume, therefore, that the declarations of an agent or servant are not competent unless they are part of the principal act, occurrence, or transaction. But in ascertaining the general doctrine we do not complete our work, for we have still to ascertain and decide whether the declarations of the engineer can be deemed part of the occurrence in which the appellee was injured, and, in order to reach a correct conclusion, it is necessary to examine the authorities with some care; not, however, for the purpose of ascertaining the general rule, but for the purpose of ascertaining what the cases declare to be part of the *res gestæ*. In *Binns v. State*, 57 Ind. 46, the doctrine of *Bland v. State* was held to govern a case where the witness reached the woman who had been shot after he had run a distance of two or three hundred yards, and arrived at the place where the shooting was done a minute and a half after she had been wounded, and the judgment of the court was that her declarations were not part of the *res gestæ*. A very similar application of the rule was made in *Dukes v. State*, 11 Ind. 564. The question arose in the case of *Railroad Co. v. Hunter*, 33 Ind. 335, upon this state of facts: The body of the man who had been killed was on the train. It had been carried to the town of Lanesville, some miles distant from the place where the accident occurred, and the fireman of the engine which ran over the deceased made statements while the body was being removed from the train. These statements were held to have been erroneously admitted, the court citing, as authority for its conclusion, *Luby v. Railroad Co.*, supra; *Moore v. Meacham*, 10 N. Y. 207; *Lane v. Bryant*, 9 Gray, 245. The case of *Railroad Co. v. Theobald*, 51 Ind. 246, asserts the general doctrine that declarations of trainmen are incompetent unless made at the time of the occurrence; but it does not assert what shall be deemed part of the occurrence, nor does the opinion show how much time had elapsed between the performance of the agent's act and the time of making the declarations. The statements of the agent which were held rightly excluded in *Railroad Co. v. Wright*, 80 Ind. 182, were made at a place different from where the injury was received, and 30 minutes or more after the occurrence which caused it. In *Stephenson v. State*, 110 Ind. 358-372, 11 N. E. 360, the declarations excluded were made after the deceased had left the place where he was wounded, after the accused had left the spot, and after the deceased had gone into a saloon and remained for some time, so that a very considerable interval of time had elapsed. The court held in *Jones v. State*, 71 Ind. 68-81, that statements made by the deceased after he was shot, naming the person who shot him, and narrating a past occurrence, were not competent. So in

Doles v. State, 97 Ind. 555, the evidence was held to be properly excluded, because, as the court said, "it was merely a narrative of a past transaction, and not part of the *res gestæ*." None of the cases we have cited precisely fits the one before us as to the point under immediate discussion. In the class represented by such cases as *Binns v. State* one of the actors in the occurrence was absent, so that the declarations could not have been made part of the *res gestæ*. We suppose it clear that, where one of the principal actors in a transaction goes from the place where the transaction took place, what subsequently occurs cannot ordinarily be regarded as part of the *res gestæ*. In the class of cases of which *Railroad Co. v. Hunter* is a type, the declarations were made at a place and at a time different from that at which the transaction took place. The case at our bar differs from those cited in essential particulars, for here the declarations were made at the time and place where the collision occurred, and they referred to and illustrated the event, and they were made while all who participated in it were present. We may therefore well adjudge that there was no error in overruling the appellant's objections without denying the doctrines asserted in our cases.

The latest decision of our court upon the question before us is that given in the case of *Railroad Co. v. Buck*, 116 Ind. 566, 19 N. E. 453. In that case the conductor of the train on which the intestate of the plaintiff was employed as a brakeman was on the "caboose" when he received notice that the deceased had been injured while coupling cars; that he immediately ran forward, and found the deceased under the rear end of the second car from the engine. The conductor, when he took the deceased from under the car, asked, "How did this happen?" and the deceased fully described the cause of the accident. The court held that this testimony was competent, and cited many cases in support of its conclusion. We think the doctrine declared in that case decides the point here under direct consideration against the appellant. Counsel argue with plausibility that the doctrine of the case cited does not apply to the case before us. One of the reasons assigned in support of their position is that the declarations admitted in that case were those of the injured person, while the declarations admitted in this instance were those of the agent or servant. A complete and effective answer to this argument is that, if the declarations were, as the case referred to adjudges, part of the *res gestæ*, they were competent, no matter by whom they were made. *Baker v. Gausin*, 76 Ind. 317; 1 Whart. Ev. (3d Ed.) §§ 259-261. Our conclusion receives support from the familiar rule that, where part of a conversation is competent, the whole is admissible, unless some part of it is excluded by other rules of law. In the case before us the in-

terval of time that elapsed between the actual injury and the time of making the declarations is not so great as it was in *Railroad Co. v. Buck*, supra. Here, as there, the declarations were made while the injured man was at the place where he was hurt, and the declarations were made to him by one who had taken part in the thing done. Here there is even a clearer and stronger line of causal connection between the direct injury and the declarations of the agent or servant than there was in the case of *Railroad Co. v. Buck*. In *Stephenson v. State*, supra, it was said "the time is not always so essential," and so we say here. The brief time that elapsed after the engineer stopped his engine and reached the car where the appellee was sitting was not so essential as to break the line of connection that binds the acts together. We are strongly inclined to the opinion that, where an employé is injured in a collision, all that is done towards stopping the train and relieving the injured employé from a dangerous position forms part of one occurrence, but, without authoritatively affirming this, we do affirm that, where there is such a continuous chain of acts and events as there was in this case, all are part of the *res gestæ*. It is true, as Mr. Wharton says, that "immediateness is tested by closeness, not of time, but of causal relation." 1 Whart. Ev. (3d Ed.) § 262. This conclusion we regard as involved in the principle thus stated in the case of *Railroad Co. v. Buck*: "It is not always easy to determine when declarations having reference to any act or transaction should be received as part of the *res gestæ*, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said, that declarations which are the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made, so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the closest principles of justice, be admissible as part of the act or transaction itself." Our conclusion is that there was no error in admitting declarations of the engineer that did not refer to acts done or matters which happened prior to the collision which caused injury to the appellee.

The other branch of the general question of the competency of the declarations of the engineer—that resting on the motion of the appellant to strike out—requires only very brief mention. The motion asked the court to strike out the statement of the appellee that the engineer said: "If that man last night would have fixed that cylinder cock, as I told him, you would never have been hurt." This declaration related to the past,

and was a narrative of what had been done at an entirely different time and place. It was, indeed, a combination of an opinion and a narrative of the things that had passed, for it was a statement of the engineer's opinion that if, on the night before, something had been done which he had then directed, the collision could not have taken place. It is too well settled to excuse the reference to authorities that neither narratives of past occurrences nor matter of opinion can be placed before a jury by proving the declarations of an agent or servant. For the error in overruling the motion to strike out the objectionable testimony the judgment must be reversed, and, although many other questions are discussed by counsel, we do not deem it necessary to consider or decide them, as they may not arise on another trial.

On Rehearing.

(Dec. 17, 1892.)

OLDS, J. Counsel for appellee have filed a petition for rehearing in this cause, and by a learned and able argument insist that a rehearing should be granted. The cause had due consideration and the questions involved were fully considered in the original opinion, and we deem it necessary to consider but one question only presented by the petition for rehearing. It is contended by counsel for appellee that the question decided adversely to the appellee, and for which the judgment was reversed, was not properly presented to this court for decision; that the competency of that portion of the testimony of the plaintiff as a witness, stating that the engineer, Brumley, told him that, "if that man last night had fixed the cylinder cock as I told him, you would not have been hurt," was only raised by a motion to strike out; that such statement was made in answer to a competent question, which elicited other competent testimony in connection with such incompetent testimony. After the answer was given by the witness to the question, counsel for appellant made a motion to strike out the incompetent part of the answer, stating his reasons, and the court overruled the motion, and the appellant excepted. The reason for new trial relating to this evidence alleges "that the court erred in permitting the plaintiff, while testifying as a witness in his own behalf, to testify to the following, to wit: That after the accident resulting in the injuries complained of, and after plaintiff had received said injuries, he (plaintiff) asked the engineer, Brumley, how this happened, [referring to the accident,] and that said Brumley told the plaintiff, in answer to said inquiry, that he, Brumley, could not throw the reverse lever forward, and that 'if that fellow had fixed the cylinder cock as I told him to, this thing would not have happened.'" And there was no reason assigned for new trial based on the error of the court in over-

ruling the motion to strike out. It appears by the record that a proper motion was made to strike out this latter statement of the witness, which was in the original opinion held to be erroneous, and an exception to the ruling was reserved. It would seem that as a matter of fact the trial court's attention was called directly to the question which was passed upon, and decided by this court. A motion for new trial was made, in which one of the reasons assigned was error in admitting this statement, together with the statement that the engineer said he could not throw the reverse lever forward. On appeal in this court the question as to whether or not these particular statements were both or either of them competent was discussed by counsel, and the question as to whether the latter statement of the witness was competent or not was treated as being properly presented by the record. It would seem quite evident from the fact that a separate motion to strike out the particular part of the statement of the witness which was held by this court to be incompetent, and from the motion for new trial and the discussion in this court by briefs and orally, that the question was treated as in the record, and the trial court passed upon the question reviewed by this court in passing upon the motion for new trial; and, if the question is not properly before this court, it is on account of a technical defect in the form of the motion for new trial. It is not the practice, and it is not incumbent on a party in a motion for new trial, to set out in detail a verbatim copy of the evidence admitted over objection or offered and refused, or a verbatim statement of the objections made to its introduction. It is sufficient if the evidence be referred to with such certainty as to call the attention of the court to it, and to the ruling in relation thereto, so that the judge could not mistake the matter and the ruling alluded to and complained of by the party filing the motion. *Clark v. Bond*, 29 Ind. 556; *Ball v. Balfe*, 41 Ind. 222; *Meyer v. Bohlring*, 44 Ind. 241.

The motion for new trial bases the error in permitting the plaintiff, while testifying as a witness, to testify to the statements. This is in a certain sense true. The error was in permitting the witness to testify to the erroneous statement, but being coupled, as it was, in an answer to a proper question, with a statement that was competent, the proper way to save the error in allowing it to go to the jury was by a motion to strike out the objectionable statement. The motion for new trial does not point out the particular erroneous ruling as clearly as it might, and possibly not as clearly as it should, but it is not necessary to decide as to the technical sufficiency of the motion, for under the rules of this court the question was properly decided. Rule 26 of this court provides, among other things, that "if a statement of fact is made by counsel, and

not questioned or explained by opposing counsel, it will be deemed by the court to be accurate." Counsel for the appellant, in his original brief in this case, after discussing the admissibility of all the statements of the witness in answer to the question, continued by making the following statement in relation to this particular question: "We submit there was error in refusing to strike out the last sentence of Stein's evidence of Brumley's statement. It was specifically referred to in the motion for a new trial, and is shown on page 76, lines 9 to 11. He said: 'If that man last night would have fixed that cylinder cock as I told him, you would not have been hurt.' This statement was not questioned or explained by counsel for the appellee, but, on the contrary, counsel for appellee said in his brief: 'It follows, it seems to us, from the weight of authority and upon principle, that the court below was right in admitting Brumley's statement as evidence, without invoking its discretionary power over the matter.' And the whole of Brumley's statement, including the last sentence, 'If that man last night would have fixed that cylinder cock as I told him, you would never have been hurt,' was competent evidence. Two objections were made to this sentence: (1) That it was uttered in the absence of any agent of the defendant, 'and the testimony thereof is hearsay.' (2) Not a part of the *res gestæ*, because made wholly after the accident and injury complained of. We have shown that

it was part of the *res gestæ*, and therefore that it was uttered in the absence of defendant's agent is a worthless objection. We need say nothing more on the question of *res gestæ*. Was it hearsay?"—and proceeded to discuss the question. After a question has been treated in this manner by counsel, and considered and decided by the court, we cannot permit parties to come into court on a petition for rehearing, and successfully urge as a ground for the granting of a rehearing that the reason assigned in the motion for new trial is too informal, and fails to point out with sufficient certainty the particular ruling which was erroneous. Such a practice would lead to endless confusion and uncertainty, and we can see no reason why there should be a departure from the general rule in this case. There is nothing in the record or brief of counsel for appellant to excuse counsel for appellee from an examination of the record, and controverting the fact as to whether the question decided was properly presented. The rule, even in cases where new trials are granted, is that it is too late, after a new trial has been granted, to object that the motion was not reasonably made. *Kloster v. Elliott*, 123 Ind. 176, 177, 24 N. E. 99. Parties must be diligent, and make their objection at a reasonable time; and after they have joined in a discussion, and obtained a decision, they cannot be heard to say that the question was not properly raised. The petition for rehearing is overruled.

LAKE SHORE & M. S. RY. CO. v. HERRICK.

(29 N. E. 1052, 49 Ohio St. 25.)

Supreme Court of Ohio. Jan. 19, 1892.

Error to circuit court, Huron county.

Action by Herrick against the Lake Shore & Michigan Southern Railway Company to recover damages for personal injuries. From a judgment of the circuit court reversing a judgment of the common pleas, defendant brings error. Affirmed.

John M. Lemon, for plaintiff in error. S. A. Wildman and G. T. Stewart, for defendant in error.

BRADBURY, J. The defendant in error, in his petition in the court of common pleas, averred, among other matters, that he had bought of the railway company a ticket entitling him to travel on its railroad from Norwalk to Collins, the station next east from Norwalk, and return; that on his way to the passenger-train to take passage it was necessary to cross a track of defendant on which a west-bound passenger-train was due; that the railway company had caused notice to be posted on its bulletin-board there, that this latter train was 15 minutes late, and that defendant in error, relying on said notice, was lawfully crossing said track when said latter train, hidden from his view by obstructions, came into the station on time, or nearly so, and at a reckless and negligent rate of speed, without signal by bell, whistle, or otherwise, whereby he was injured without fault on his part by being violently struck and run upon by said train. The railway company by answer put in issue all these averments of the petition, except that the defendant in error was struck and injured by the train. It also answered that "the plaintiff was well acquainted with the movements of trains, and the tracks and premises where he was injured, and on said December 8, 1881, without necessity or excuse therefor, went upon defendant's railroad track, and by his own negligence and want of ordinary care directly contributed to his injury;" which last defense was denied by the reply. The issues thus made up between the parties required the plaintiff in the court of common pleas to prove that he was at the station in the character of a passenger. It was also material for him to show that he was misled and his vigilance lulled by the statements on the bulletin-board of the railway company that the train was late. He complained in the circuit court, among other things, that the court of common pleas had, on the trial in the latter court, excluded from the jury certain evidence that was admissible to establish his contention in these particulars, and that incompetent evidence had been admitted by that court over his objection. The circuit

court stated upon its journal that the ground of its action in reversing the judgment of the court of common pleas was the rulings of the latter court in admitting and rejecting evidence, and that in other respects it found no error in the proceedings of that court. This entry on the journal of the circuit court excludes any inference that the judgment was reversed because the verdict was against the weight of the evidence, and therefore the judgment of the circuit court may be reviewed by this court. The bill of exceptions does not purport to contain all the evidence, nor even any considerable part of it, but is limited to that which was offered and rejected or immediately connected with and explanatory of it, and that which plaintiff below contends was improperly admitted. The item of evidence first excluded from the jury, as shown by the bill of exceptions, was in the deposition of Vinton F. Sheldon, who testified to a declaration of the porter at the hotel, of which it appears the plaintiff below was proprietor. The witness was asked if he was present, and if so, what he saw of it, etc. He answered: "I was there. It was in the morning of the 8th of December; I was waiting to take a train to Wakeman. Mr. Herrick sent a porter over to see about the train, as I was stopping at Herrick's hotel and wished to take the train. The porter reported the train fifteen minutes late." The last sentence, "The porter reported the train fifteen minutes late," was on motion of the railway company excluded from the jury, to which ruling the plaintiff below excepted. This evidence, we think, was competent, and should have been admitted; it was not offered in proof of the fact that the train was 15 minutes late, or even late at all. The plaintiff below did not contend that the train was late; it was not his theory of the accident; on the contrary, he insisted that it came in on time, or nearly so. That, in his view, was the immediate cause of his injury; he acted on the supposition that the train was late, and crossed the railroad track to enter as a passenger a car of another train of the same company going in another direction, because he believed it to be late. The state of his belief in this respect becomes important upon the question of his own contributory negligence; his vigilance had been disarmed, as he contended, by information that he had no cause to suspect was false. This it was material that he should establish, and whatever evidence tended to that end was competent. The report of his own messenger, whether true or false, certainly tended to show that he believed the train to be late. Acting upon such information, one might well attempt to cross a railway track without being chargeable with negligence, whereas if he acted heedlessly, without inquiry, the act would be properly characterized as negligent, or even reckless. Nor was this evidence less competent because he had afterwards seen

the notice upon the bulletin-board himself. Error committed in the rejection of competent evidence is not cured because there was other and even stronger evidence to establish the same fact introduced to and considered by the jury.

On the trial in the court of common pleas the defendant in error read in evidence to the jury the deposition of George E. Miller, who was a clerk at the Herrick House, an hotel of which the defendant in error was proprietor. In response to a question put to him this witness answered: "In the morning Mr. Herrick was injured he started out, and said he was going to Collins. I asked him if he had his ticket, as he had one in the money-drawer, and I looked to see if he had it." Upon the motion of the railroad company the words "said he was going to Collins" were ruled out, to which ruling defendant in error excepted. The defendant in error had averred in his petition "that he had bought and procured of the defendant a ticket as a passenger on its trains to and from Collins, the station on said railroad next east of said Norwalk, and at the time of the occurrences hereinafter stated was crossing said track nearest to said platform for the purpose of taking passage on said eastward-bound train for said Collins." The railroad company had not only denied this, but had also averred as a separate ground of defense that the defendant in error, "without necessity or excuse therefor, went upon defendant's railroad track, and by his own negligence and want of ordinary care directly contributed to said injury." It therefore became material for defendant in error to show that he was injured while on his way to the train that ran to Collins, for the purpose of getting on as a passenger to be carried to that place. Was his declaration that he "was going to Collins" competent evidence of that fact? That depends on whether the declaration was contemporaneous with, and explanatory of, the act of departure. One departing from home may have in view any conceivable place, or any conceivable purpose, as his destination or object. The act of departure is thus in itself of the most ambiguous character; it does not afford the slightest clue to the object of the journey; it is natural and usual, according to the common experience of mankind, that the party should say something respecting his departure, of an explanatory character. Declarations thus made are a part of the act itself. Starkie in his treatise upon Evidence lays down the rule as follows: "In the first place, an entry or declaration accompanying an act seems, on principles already announced, to be admissible evidence in all cases where a question arises as to the nature or quality of that act. * * * Such evidence is also admissible on the same principle, to show the intention with which an act is done, where the intention is material. Thus, on questions of bankruptcy, dec-

larations made by a trader, contemporary with, or during the act of, absenting himself from his place of residence or business, are constantly admitted in proof of the real nature and quality of the act. Indeed, whenever an entry or declaration reflects light upon or qualifies an act which is relevant to the matter in issue, and is evidence in itself, it becomes admissible as part of the *res gestæ*, if it be contemporaneous with the act. * * *" (10th Ed.) 466, 467. This doctrine has received the sanction of this court in a number of cases. "Where an act of a party is admissible in evidence, his declarations at the time, explanatory of that act, are also admissible as part of the *res gestæ*." *Whetmore v. Mell*, 1 Ohio St. 26. See, also, *Insurance Co. v. Tobin*, 32 Ohio St. 78; *Leggett v. State*, 15 Ohio, 283; *Moore v. State*, 2 Ohio St. 500; *Dickson v. State*, 39 Ohio St. 73. This doctrine is discussed and maintained by the text-writers, (Whart. Ev. 262, 1102; Greenl. Ev. 108;) as well as illustrated by almost innumerable adjudicated cases, only a small number of which need be referred to, (*Milne v. Leisler*, 7 Hurl. & N. 786; *Blake v. Damon*, 103 Mass. 199; *Ahern v. Goodspeed*, 72 N. Y. 108; *Louden v. Blythe*, 16 Pa. St. 532; *Scott v. Shelor*, 28 Grat. 891; *Stephens v. McCly*, 36 Iowa, 659; *Colquitt v. State*, 34 Tex. 550). As every intendment favorable to the ruling of the court of common pleas should have been indulged by the circuit court, and should be by this court also, the question arises whether the record discloses with sufficient certainty that the declaration excluded was made by the defendant in error at the time he departed to take the train rather than upon some other occasion when he may have left the hotel. The bill of exceptions is meager; it does not purport to set forth all the evidence, or all the other proceedings had at the trial. All that it discloses on this subject is as follows: "Plaintiff then read in evidence to the jury the deposition of George E. Miller, who testified that he was clerk of the plaintiff at his hotel, the Herrick House, when the said injury to the plaintiff occurred, and, in reply to the question of what he then saw, the witness said: 'In the morning Mr. Herrick was injured he started out, and said he was going to Collins. I asked him if he had his ticket, as he had one in the money-drawer, and I looked to see if he had it.' To which words, 'said he was going to Collins,' the defendant objected." This witness stated, as disclosed in another part of the bill of exceptions, that the ticket was gone when he looked to see if Herrick had it. So, take the entire bill of exceptions, it shows that the defendant in error had procured a ticket to Collins, and had it in the money-drawer of his hotel; that he had taken it out of the drawer, and was leaving the hotel when he made the declaration respecting his destination. From these circumstances we think it fair to infer that he was at the time depart-

ing on his proposed journey; but whether he was or not, as there are other grounds upon which the judgment of reversal should be affirmed, it is quite proper at this time to declare the true rule respecting this evidence, as the death of the defendant in error in all probability makes this declaration the only evidence now attainable of the intent with which he left the hotel on the morning of the accident.

The defendant in error also read in evidence the deposition of W. O. Foldger, who testified as follows: "I was walking towards the west end of the depot, my back to the engine, to cross the track diagonally, when I heard the call, and turned my head; then engine was then right behind me;" being the same by which the plaintiff was then and there injured. And the plaintiff's attorney then asked the witness in said deposition, "State whether or not you saw other persons who were in danger of being run over by it;" to which the witness answered, "There were people crossing till the engine was right there, and some one hallooed. I saw no one hit except the plaintiff;" to which question and answer the defendant objected, and the court sustained the objection, and ruled out said question and answer from the deposition, and the same were not read in evidence to the jury, to which ruling of the court the plaintiff then and there excepted. The condition of the crossing at the time of the accident was material. Was it thronged with people or otherwise? The train might not have been chargeable with carelessness, even though it came into the station at a high rate of speed, if the defendant in error, alone or with only a few others, was there, while it might be careless, or even reckless, to dash in at the same rate among a crowd of people, who might jostle against and impede each other in their struggles to escape. The question was subject to the criticism that it called for an opinion of the witness as to whether there were "other persons who were in danger of being run over by it," but the answer was free from that objection; it was limited to matter of fact. "There were people crossing till the engine was right there, and some one hallooed. I saw no one hit except the plaintiff." This answer was competent evidence, and should have gone to the jury; it not only tended to establish negligence in the running and management of the train, but also had some tendency to refute the charge of contributory negligence, by establishing the existence of conditions at the time likely to create panic and confusion, if, as claimed, the rapidly moving train came suddenly and unexpectedly upon the crowd of people at the crossing, thereby causing the choice of means of escape more difficult and perplexing. The other testimony excluded from the jury is not of sufficient importance to require special notice;

most, if not all, of it was immaterial, or came within the well-settled rules of the books that exclude hearsay evidence. If there was any that did not in its own nature fall within either of these two classes, the bill of exceptions is too meagre to disclose its materiality, and its exclusion therefore was not erroneous.

The only remaining question relates to the admissibility of the ordinance of the village of Norwalk prescribing the maximum rate of speed at which trains may be run through the village. The railway company was not charged with running its train at this time at a greater rate of speed than the ordinance permitted; no issue of the kind was made up; there was not a word in any of the pleadings to indicate, even, that the village of Norwalk had ever adopted an ordinance on this subject. In what manner, therefore, the ordinance could enlighten the jury respecting the issues on trial before them is not shown by an examination of the pleadings alone. Surely the plaintiff in error could not justify dashing its train, regardless of consequences,—if it did so,—into a crowd of people crossing its track, because its rate of speed at the time was within the limits prescribed by ordinance. If such use of the evidence can be supposed to have been attempted, we must presume that the court properly limited its operation in the charge given to the jury, or would have done so upon request of the other party if made at the proper time. It was not error, however, to admit the ordinance in evidence if it was competent for any purpose. The pleadings, as before stated, do not mention it, and the bill of exceptions is very meager, yet enough can be gathered from it to disclose that a controversy arose during the trial as to the rate of speed at which the train, before it reached the station, passed through the village of Norwalk, though nothing appears to show the distance it ran within the corporate limits; the plaintiff in the common pleas court contending that the train ran through the village at a rate exceeding 15 miles an hour, the defendant, on the contrary, claiming that the rate of speed was less than that. In this connection it is at least conceivable, if not apparent, that it might have been material for the railway company to show that in passing through the village, and before it approached the station near enough to enable its employees to see the condition of the crossing, the train did not move at an unlawful rate of speed, which would render its management and control more difficult when the danger at the crossing was discovered. We cannot say, therefore, that the court erred in admitting the ordinance in evidence.

Judgment affirmed.

DICKMAN and SPEAR, JJ., dissent from the judgment of affirmance.

SEVILLE v. STATE.

(30 N. E. 621, 49 Ohio St. 117.)

Supreme Court of Ohio. March 2, 1892.

Error to circuit court, Athens county.

David Seville was convicted of engaging in a prize-fight, and brings error. Affirmed.

E. A. Guthrie and L. M. Jewett, for plaintiff in error. J. P. Wood, Pros. Atty., and C. H. Grosvenor, for the State.

WILLIAMS, J. The plaintiff in error, David Seville, was indicted for a violation of section 6888 of the Revised Statutes, which provides that "whoever engages as principal in any prize-fight shall be imprisoned in the penitentiary not more than ten years nor less than one year." The indictment charges that on the 25th day of February, A. D. 1891, at the county of Athens, he "did unlawfully engage as principal in an unlawful and premeditated fight and contention, commonly called a 'prize-fight,' with one Arthur Majesty, and in said fight the said David Seville and Arthur Majesty did each the other unlawfully strike and bruise, and attempt to strike and bruise, for and in consideration of prize and reward." The trial resulted in a conviction, which was followed by the sentence of the court, and one of the grounds upon which a reversal is sought is that the indictment is defective. The specific objections made to the indictment are that it fails to allege the fight was in public; that it does not negative the existence of the facts mentioned in the proviso of section 6890 of the Revised Statutes; and that it contains no direct averment that the accused engaged in a prize-fight.

1. In support of the first of these objections, the case of *Sullivan v. State*, 67 Miss. 346, 7 South. 275, is relied on, where it was held that an indictment drawn under the Mississippi statute of March 7, 1882, making it "unlawful for any person to engage in prize-fighting," in that state, was insufficient, because it did not aver that the fighting took place in public; the court holding that the statute was intended to prohibit prize-fighting of a public character only. We are not inclined to follow that decision. While, no doubt, it was one of the purposes of our statute to prohibit public exhibitions of prize-fighting, because they tend to incite quarrels and breaches of the peace, it was, we think, none the less its purpose to suppress all prize-fighting, on account of its brutality, and consequent danger to human life, and its demoralizing tendencies, and pernicious effects on the peace and good order of society; and hence we hold it is not an essential ingredient of the crime of engaging in a prize-fight, in this state, that it take place in public. The term "prize-fight" has no technical legal meaning. The Century Dictionary defines it as "a pugilistic encounter or boxing match for prize or

wager," and other lexicographers who define it give it substantially the same definition. It is used in the statute in its ordinary signification of a fight for a prize or reward, and includes all fights of that character, however conducted, and whether witnessed by many or by few people.

2. Section 6890 of the Revised Statutes makes it an offense, called an "affray," for any two persons to agree and willfully fight or box at fisticuffs, or engage in any public sparring or boxing exhibition, with or without gloves; for which the penalty is fine or imprisonment, or both. The section contains a proviso that it shall not apply to the exercises in any public gymnasium or athletic club, if written permission therefor shall have been obtained from the sheriff of the county or mayor of the municipality in which the exercises are held; and the second objection to the indictment is that it should, by proper averments, negative the existence of the matters contained in this proviso. This objection is not well taken. It is the well-settled rule of criminal pleading that it is not necessary, in an indictment, to negative the existence of facts to which an exception or proviso in a statute relates, unless the matter of the exception or proviso is descriptive of the offense, or qualifies the language creating it. *Hirn v. State*, 1 Ohio St. 16. Engaging in a prize-fight, in violation of section 6888, is a separate and distinct offense from that defined and punished by section 6890, and the proviso qualifies the previous clauses of the latter section, but has no application to former sections.

3. Nor do we think the indictment lacks a direct averment that the accused engaged as principal in a prize-fight. The averment that he engaged as principal, with another, in an unlawful and premeditated fight, commonly called a "prize-fight," for a prize and reward, is sufficient to apprise the accused of the nature of the accusation, in this respect. The indictment meets the requirements of the rules of criminal pleading, and appears to be drawn in accordance with the forms long in use, and approved by well-known authors. *War. Crim. Law*, 241; *Wilson's Ohio Cr. Code* (3d Ed.) 105; *Maxw. Cr. Proc.* 230.

4. On the trial, the state gave evidence tending to prove that Douglas Nelson and Emil Rosser, two citizens of Nelsonville, about the 1st of February, 1891, made an arrangement with Seville, by which the latter agreed to engage in a fight at Nelsonville, at a future day to be named, with a person not exceeding a specified weight, to be chosen by them, for a prize of \$200, to be paid to the winner. The arrangement with Seville was communicated to Majesty, who at once agreed to engage in the fight against Seville, which, it was arranged, should take place at Nelsonville on the night of Febru-

ary 24, 1891. When the agreement was made with Seville, he did not know the name of his adversary, nor did he learn it, until the day set for the fight. Soon after the details of the engagement were completed, Majesty, who resided in Toledo, went to Nelsonville with his trainer, and put himself in training for the conflict. While there, he wrote two letters to his friend Alfred Stephens, which were directed and mailed to him at Newark, Ohio, and which were received by Stephens in due course of mail. These letters were admitted in evidence against the objection of the defendant, and their admission, it is claimed, was error for which the judgment should be reversed. The letters are as follows:

"Nelsonville, O., Feb'y 15, 1891. Friend Alfred: Would like to have you come to Nelsonville, O., where I am matched to fight Seville, of Columbus, for a purse of \$200.00, to a finish, with 2-oz. gloves. You can call on Keere Bros., in the saloon business; they will be down here. Do not tell them who I am or that you know me, as I go under the name of A. B. Tracy. Our protection is good, as we have a license. Come if you possibly can. We fight on Feb. 24th, in the evening. Will see you all right. Am in training here. If you come this way, stop and see me. Yours, truly, Arthur Majesty. Address A. B. Tracy."

"Nelsonville, O., Feb'y 20th, 1891. Friend Alfred: The man I meet is Seville, of Columbus, and we fight at 120 pounds for a purse of \$200.00, all to go to the winner. Nelson and Rosser of this place are handling me. I don't anticipate any trouble in disposing of him. John Hall, of Toledo, is with me. You have met him before. Tickets are \$3.00 per head, but I will place you all right; but do not let those people of your town know of it. If you can, induce them to come and see the fight. It is to a finish, with two-ounce gloves, in a large hall, with a seating capacity of 800 on elevated seats around the ring, same as all first-rate clubs. Yours, truly, Arthur, alias A. B. Tracy."

An agreement to engage in a prize-fight is a conspiracy to commit a crime; and the declarations of either of the parties, written or verbal, with reference to the common object, or in furtherance of the criminal design, while in its prosecution, are competent evidence against the other, although the agreement was made through and by backers or other representatives of the principals, and the latter were unknown to each other. The letters referred to contained declarations of this character; their purpose being to procure the presence of friends and others at the fight, and thus encourage and contribute to the success of the unlawful enterprise. The court in its charge carefully limited the effect of this evidence by instructing the jury that, before it could affect the accused, the jury must find, beyond a reasonable doubt, that when the letters

were written he and Majesty had entered into an agreement, either personally or through their agents, to engage in a prize-fight, and that they were written while Majesty was engaged in preparations for the fight, and were in furtherance of it.

5. The defendant offered to prove in his defense that there was an athletic club at Nelsonville, where the pugilistic contest was held, and that a license authorizing it had been issued by the mayor of the village; and for that purpose the articles of the association of the club and license of the mayor were offered in evidence, but excluded. The articles, which bear the date of February 23, 1891, state that "the undersigned citizens of Nelsonville intend to establish an athletic club for the purpose of training in wrestling, boxing, and other athletic exercise;" they prescribe the terms of membership, and designate the officers to be chosen. The only evidence of the execution of the paper was that of a witness who testified that he drew it up, but there was no proof of the signatures to it, or of any organization under the articles. The license offered in evidence is dated February 23, 1891, and purports to grant permission to the Nelsonville Athletic Club to exhibit a glove contest "for one day only, February 24, 1891." If the defendant had been indicted for a violation of section 6890, the evidence offered would have been competent and material. But such a license, to a club of the kind mentioned, is no defense to an indictment under section 6888. If the defendant engaged in a prize-fight, it was immaterial whether a license had been issued to an athletic club for that purpose, or for the purpose of giving a boxing exhibition, or not. If he did not, but simply engaged in a sparring or boxing exhibition, he must be acquitted though no license was obtained. Neither the articles of the club nor license of the mayor was competent evidence tending to prove that what actually occurred constituted a sparring or boxing exhibition. At most, they tended to show that the mayor only intended to license a boxing exhibition, and that the club was authorized to give such exhibition; neither of which facts was material in determining whether what actually occurred was or was not a prize-fight.

6. The defendant called a witness who testified that he had been engaged in 52 prize-fights and boxing matches altogether, and had spent 6 years in acquiring the art of boxing. He was then asked by counsel for the defendant to state what "are the rules that apply to a glove contest and also to a prize-fight." An objection to the question was sustained. The purpose of the question, as stated by counsel, was to prove that by the rules governing prize-fights there is no limit as to the time of the rounds, the combatants are permitted to wrestle and throw each other, the fight is to a finish, the fight

is without gloves, and spikes are worn in the shoes; while the rules governing glove contests require the parties to wear gloves, spikes in the shoes are not allowed, the contest ends at the conclusion of a specified round, and each round is limited in point of time to three minutes. The witness further testified that he saw the combat between the defendant and Majesty, and was then asked by defendant's counsel whether it was conducted according to the rules of a glove contest or those of a prize-fight. This question was objected to, and the objection sustained. The counsel stated they expected the witness to answer that it was conducted according to the rules of a glove contest. Thereupon the witness was handed a couple of papers, one of which he said contained the Queensberry rules, and the other the London prize ring rules. These papers were then offered in evidence by defendant's counsel, but they were held to be incompetent. These several rulings of the court are assigned for error.

The question to be determined by the jury was whether what took place between the defendant and Majesty, at the time and place charged in the indictment, was a prize-fight. The witnesses for the state, and for the defense, testified in detail to what occurred on that occasion, and there was but little, if any, substantial conflict in the testimony. It showed, beyond any doubt, that the combatants met in the ring prepared for the purpose, in pursuance of the agreement previously made, and fought viciously to a finish. They fought 17 rounds, and on the eighteenth Majesty was knocked reeling to the ropes, and carried away in a dazed and unconscious condition, and in a few hours afterwards died from the effect of the blows received. The post mortem examination disclosed that his vital organs

were in a healthy and sound condition. His skull was fractured by one of the blows, and an artery of the brain ruptured, which caused his death. His head, neck, one arm, and his body showed the severity of the blows he had received. One eye was blacked, his nose cut, his mouth and lips bruised and swollen, and the physicians say that his neck, arm, and body were black and blue from bruises produced by blows. Witnesses describe the blows struck him as bitter blows; and yet, up to the last round, they say Seville's punishment was even greater than that administered to Majesty. When Majesty was carried, disabled and dying, from the scene of the conflict, the prize money was paid over to Seville, who departed by the first train.

The question for the jury to decide, was whether this combat was a prize-fight, not what the Queensberry rules or any other rules called it, nor what name those accustomed to such combats have given it. What was it, in plain English? And this question of fact, under a proper instruction from the court as to what constitutes a prize-fight, the jury was as competent to decide as the most experienced boxer or prize-fighter. The question was not one of skill or science, to be decided upon the opinions of those experienced in such practices, or by rules adopted for the government of associations of such persons; but one within the comprehension of the common understanding, and the range of common knowledge, which the jury could decide upon the facts proven, as well as a professional pugilist. Some other questions are made in the record, but they are not of sufficient importance to call for a report. We have carefully examined the whole record, and find no error for which the judgment should be reversed. Judgment affirmed.

COMMONWEALTH v. BRADFORD.

(126 Mass. 42.)

Supreme Judicial Court of Massachusetts.
Hampshire. Nov. 18, 1878.

Exceptions from superior court, Hampshire county; Gardner, Judge.

C. R. Train, Atty. Gen., for the Commonwealth. C. Delano, for defendant.

COLT, J. The defendant was indicted for willfully and maliciously burning a building belonging to his two sons. The second count in the indictment charges an intent thereby to defraud the insurer. At the trial evidence was admitted in support of the indictment, against the defendant's objection, tending to prove that the defendant set fire to the same mill a few nights before, and that the fire was then discovered and extinguished by a neighbor.

The evidence was competent on the question of the intent with which the defendant subsequently burned the building, and committed the offense for which he was then tried. It was carefully limited to the single purpose for which it was competent. The unsuccessful attempt to do the same thing, a few days before, was evidence that the burning was willful and intentional, and not the result of accident or negligence on the part of the defendant. It was sufficiently near to the time of the commission of the offense charged to justify the inference that the defendant then had a settled purpose in regard to it. It is a rule of criminal law that evidence tending to prove a similar but distinct offense, for the purpose of raising an inference or presumption that the accused committed the particular act with which he is charged, is not admissible. But there was no invasion of this rule in the admission of this evidence. The intent and disposition with which one does a particular act must be ascertained from his acts and declarations before and at the time; and when a previous act indicates an existing purpose, which, from known rules of human conduct, may fairly be presumed to continue and control the defendant in the doing of the act in question, it is admissible in evidence. In many cases it is the only way in which criminal intent can be proved; and the evidence is not to be rejected because it might also prove another crime

against the defendant. The practical limit to its admission is that it must be sufficiently significant in character, and sufficiently near in point of time, to afford a presumption that the element sought to be established existed at the time of the commission of the offense charged. The limit is largely in the discretion of the judge, and no error in law is here apparent.

The case at bar is not distinguishable upon this point from *Com. v. McCarthy*, 119 Mass. 354, where, on the question of intent, the government was permitted to show that the defendant a few days before set fire to a shed, ten feet distant from the building burned, and connected therewith by a flight of steps. The defendant in that case was the owner of the building burned, while in this case the defendant had conveyed the property to his sons, subject to his mortgage, which was paid in part from the avails of the insurance upon it. It is sufficient that under the second count the jury in this case must have found that the defendant willfully burned the building with intent to injure the insurer, and this is enough, whether he owned the building or not; and besides, the evidence was admissible without reference to the alleged intent to injure the insurer. See, also, *Thayer v. Thayer*, 101 Mass. 111.

The testimony of the defendant taken at the fire inquest was clearly admissible. It is objected "that a judicial oath administered when the mind is agitated and disturbed by a criminal charge, or by suspicion of crime, may prevent free and voluntary mental action." But this objection, if there is anything in it, is not sustained as a matter of fact, for there is nothing in the case to show that he was, at the time his testimony was given, proceeded against criminally, or was then under suspicion of crime. The testimony was given voluntarily, and its weight must depend upon the circumstances under which it was given. *Com. v. King*, 8 Gray, 501; *Com. v. Reynolds*, 122 Mass. 454.

The defendant's conversation with the insurance broker in January, in which he suggested that there should be an increase of insurance, taken in connection with his liability on the mortgage note which the sons had agreed to assume, tended to show that he had a pecuniary interest in the insurance, and a motive to commit the offense charged. *Com. v. Hudson*, 97 Mass. 565.

Exceptions overruled.

COMMONWEALTH v. TREFETHEN et al.

(31 N. E. 961, 157 Mass. 180.)

Supreme Judicial Court of Massachusetts.
Middlesex. Oct. 20, 1892.

Exceptions from superior court, Middlesex county.

Indictment against James Albert Trefethen and William H. Smith for the murder of Deltena H. Davis by drowning. There was a verdict of guilty as to Trefethen and not guilty as to Smith. Defendant Trefethen excepted, and asked that the case be reported to this court for determination. Verdict against Trefethen set aside.

A. E. Pillsbury, Atty. Gen., for the Commonwealth. John D. Long and Wm. Schofield, for defendants.

FIELD, C. J. The principal exception is to the refusal of the court to admit the testimony of Sarah L. Hubert. The exceptions recite that: "Sarah L. Hubert, a witness called in behalf of the defendant, testified that her business, which she advertised in the newspapers, was that of a trance medium; that on December 22, 1891, in the forenoon, after 10 o'clock, a young woman called at her place of business in Boston for consultation. There was sufficient evidence to go to the jury of her identification as Deltena J. Davis. Upon objection being made to the testimony of this witness, counsel for the defendants stated to the court, aside from the jury, that they offered to prove by this witness that at the interview on December 22d, the young woman aforesaid stated to the witness that she was five months pregnant with child, and had come to consult as to what to do, and added later in the interview that she was going to drown herself. The court refused to admit the testimony, and the defendants duly excepted." The exceptions also recite that "the evidence offered in behalf of the commonwealth was wholly circumstantial, and tended to show that on December 23, 1891, Deltena J. Davis left her home in Everett at about 7 o'clock in the evening, and was last seen on the corner of Ferry street and Broadway, which is near her home in said Everett, at about 25 minutes of 8, the same evening. On the 10th day of January, 1892, her dead body was found in the Mystic river, a short distance below the Wellington bridge, about three miles from her home. There were no marks of violence on the body when found, nor was there any evidence that poison had been administered, nor did her clothing show any signs of violence. * * * The physicians called in behalf of the commonwealth testified that the cause of death was drowning, and that, from the stage which digestion had reached, death occurred between two and one-half and three and one-half hours after the deceased had eaten her last meal. There was evidence that the deceased ate her sup-

per about 5 o'clock on the evening of December 23d, and that the partly digested food found in her stomach corresponded with that which it was testified she ate at that meal. The deceased was unmarried, and at the time of her death was pregnant with a male child, and was about five months advanced in the state of pregnancy. The defendants contended and argued, without objection, that all the evidence introduced in behalf of the commonwealth was reasonably consistent with the theory that the deceased came to her death by suicide. There was evidence in the case tending to negative the circumstances relied upon by the commonwealth, and to support the theory of suicide."

At the argument in this court the attorney general asked that if the kind and amount of evidence tending to support the theory of suicide should be thought by the court to be important, the exceptions might be amended so as to show exactly what this evidence was; and he intimated that, in his opinion, this evidence was so slight as to be unworthy of serious consideration. We understand that by "evidence" the attorney general meant direct evidence tending to prove suicide. Without considering what remedy, if any, is open to the attorney general in a criminal case where there is a reason to suppose that the exceptions taken by the defendant and allowed by the court are not sufficiently full, we are of opinion that in the present case the facts are such that suicide would naturally suggest itself as a possible explanation of the cause of death, and that, if it be true that the direct evidence tending to prove suicide is inconsiderable, yet the circumstances afforded evidence in support of the theory of suicide which must be considered by the jury. The amendment, therefore, if it were made, and were of the character suggested, would afford no aid to the court in determining the questions of law raised by the exceptions.

A few minor suggestions of the attorney general may be briefly disposed of. There was evidence on the part of the commonwealth that the deceased did not leave her home on the 22d of December until 3 o'clock in the afternoon, and that she returned home between 8 and 9 o'clock, and the attorney general argues that "this furnishes sufficient reason for the exclusion of the evidence" offered "in the discretion of the court." But the jury might have disbelieved this evidence of the commonwealth, or, if they believed it, might also have believed that the deceased had the interview with Sarah L. Hubert in the afternoon, rather than in the forenoon, of December 22d. The attorney general also argues "that the statement was so remote in point of time from the disappearance and death of Tena Davis that it was within the discretion of the court to exclude it for this

reason." When evidence of declarations of any person is offered for the purpose of showing the state of mind or intention of that person at the time the declarations were made, the declarations undoubtedly "may be so remote in point of time, or so altered in import by subsequent change in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected by the judge." It has been many times said that "some limit must, of course, be had in applying practically the rules which govern the admission of this evidence." This subject is considered in *Com. v. Abbott*, 130 Mass. 472, and in the cases there cited. There is undoubtedly a discretion to be exercised by the judge or judges presiding at the trial in the admission or rejection of this kind of evidence; but it is not an absolute discretion, and the exercise of it, when the facts appear, may be reversed by this court. If the declaration, evidence of which was offered in the present case, had been made by the deceased two or three years before her death, when she was not pregnant with child, and did not know the defendant, it might well have been held by the presiding judges to have been of no significance in the case.

In the case at bar the evidence offered was that the declaration of the deceased was made the day before her death, and was made in a conversation concerning her pregnancy, which continued until her death. The declaration, therefore, was not made at a time remote from the time of her death, and there had been no change of circumstances which made it inapplicable to the condition of the deceased at the time of her death. It was clearly competent for the jury to find from the evidence recited in the exceptions that, if Delena J. Davis had an intention to commit suicide on December 22d, she continued to have the same intention on December 23d. If the evidence, in its nature, was admissible, the court, on the facts stated, could not exclude it on the ground that from the lapse of time or change of circumstance it had ceased to be material. It ought to be said that there is nothing in the exceptions indicating that the presiding judges refused to admit the evidence on the ground that it was in their discretion to admit or reject it. They probably considered the question presented as settled by the decision of this court in *Com. v. Felch*, 132 Mass. 22.

The main argument of the attorney general is: First, that it is immaterial whether the deceased, at or before the time of her death, had or had not an intention to commit suicide; and, secondly, that, if she had such an intention, it could not be proved by evidence of her declarations that she was going to drown herself. The burden was on the commonwealth to prove beyond a reasonable doubt that the defendant killed the deceased, and to do this the jury must be satisfied be-

yond a reasonable doubt that she did not kill herself. The nature of the case proved by the commonwealth was such that it was not impossible that she had committed suicide. If it could be shown that she actually had an intention to commit suicide, it would be more probable that she did in fact commit it than if she had had no such intention. If it could be shown that during the week before her death she had actually attempted to drown herself, and had been prevented from doing it, it seems manifest that this fact, according to the general experience of mankind, would have some tendency to show that she might have made a second attempt, and accomplished her purpose. It may be true that an unmarried woman, pregnant with child, may some time say that she will commit suicide when she has no serious intention of doing it; or, if she has such an intention, she may not carry it into effect, although she may have an opportunity; but it is impossible to say that the actual existence of such an intention does not tend to throw some light upon the cause of death of such a woman when found dead under circumstances not inconsistent with the theory of suicide. It is a question of more difficulty whether evidence of the declarations of the deceased can be admitted to show such an intention. The argument, in short, is that such evidence is hearsay. It is argued that such declarations are not made under the sanction of an oath, and that there is no opportunity to examine and cross-examine the person making them, so as to test his sincerity and truthfulness, or the accuracy and completeness with which the declarations describe his intention or state of mind; and that, even if such declarations would have some moral weight in the determination of the issue before the court, they are not within any of the exceptions, to the exclusion of hearsay, which the common law recognizes.

The counsel for the defendant concede that the declaration in this case is not, under our decisions, admissible as a part of what has been called the "*res gestæ*," although they contend that some courts have admitted similar declarations on that ground. They concede that to make a declaration admissible on that ground it must accompany an act which, directly or indirectly, is relevant to the issue, to be tried, and must in some way qualify, explain, or characterize that act, and be, in a legal sense, a part of it. They concede that if this declaration is a part of the act of visiting Sarah L. Hubert, and tends to show the nature or purpose of that visit, the fact of the visit is not relevant to the issue. It does not tend to show, directly or indirectly, that the defendant killed the deceased, or that she killed herself. They concede that if the evidence of this declaration is admissible, it is on account of the nature of the declaration, and not because it was made at this interview; and that, if made to anybody else under the same cir-

cumstances, it would have the same significance. They contend that the declaration is some evidence of the state of mind or intention of the deceased at the time she made it, and that the intention which it tends to prove is a material fact, which, in connection with other facts proved, tends to support the theory of suicide. They contend that the state of mind or intention in the mind of a person, when material, can be proved by evidence of his declarations as well as of his acts, particularly when that person has deceased, and cannot be called as witness, and the declarations were made before the controversy arose which is the subject of the trial.

The evidence that declarations were made must, of course, be of the same character as the evidence that the acts were done; that is, both must be proved by the testimony of witnesses under oath, and subject to cross-examination, and in either case the examination may extend to all the circumstances which tend to show the significance of the declarations or of the acts as indications of the existing state of mind or intention of the speaker or actor. The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these, for the sole purpose of showing the existing state of mind or intention, may be inferred. For example, the exceptions recite that on the day when the deceased disappeared Trefethen called at the house of her mother "about 10 in the forenoon, and was there some time with Tena, and that Tena that day appeared bright and cheerful, and 'full of smiles,' but at times during the month prior thereto had been depressed in spirits." The only apparent object of this testimony was to show that on the day she disappeared she was happy, and, therefore, could not have contemplated suicide. Her bright and cheerful appearance might have been real or feigned, but this was for the jury. If the deceased at the same interview had said, "I was never so happy in my life as I am to-day," it is contended that this declaration might be as significant of her state of mind as her cheerful appearance, and that speaking, as an indication of what is in the mind of the speaker, is as much an act as smiling or conduct generally. The only obvious distinction between speech and conduct is that speech is often not only an indication of the existing state of mind of the speaker, but a statement of a fact external to the mind, and as evidence of that it is clearly hearsay. There is, of course, danger that a jury may not always observe this distinction, but that has not availed to exclude testimony which is admissible for one purpose and not admissible for another, to which there is danger the jury may apply it. A common instance of this is when it is a material fact in the case whether

a person at a certain time said a certain thing. The testimony of a witness who heard him say it is always admitted, although this is not evidence that what that person said was true. The present case discloses another instance. Many witnesses testified to conversations with the defendant about the disappearance of Tena Davis, and his connection with it. What they said to him, and his silence or his replies, were only admissible so far as his failure to make reply, or his replies to what was said to him, under the circumstances, tended to show that he was guilty; but the testimony of what was said to him was not, in and of itself, evidence that the statements made to him were true. Suppose that at the interview between the deceased and the witness Hubert, if there was such an interview, the deceased had said that Trefethen was the father of her child; evidence that the deceased said this is clearly hearsay, and is not admissible to prove that he was the father. But suppose that it had been denied at the trial that the deceased knew that she was pregnant, testimony that she had said that she was pregnant would be some evidence that she knew it. If, the day before her death, she had written a note, addressed to her mother, stating her condition, and declaring her intention to drown herself, and had left it in her desk when she went from home the following day, the admissibility of such a letter in evidence, after proof that she had written it, depends upon the same considerations as the admissibility of evidence of similar oral declarations. Such a written declaration differs from an oral declaration only in this: that writing is often a more deliberate act than speaking; but this affects only the weight of the evidence. It may also be thought that speech is a less trustworthy indication of what is really in the mind of the speaker than acts or appearance, but this, if it be so, also affects the weight of the evidence. Certainly, to confine the evidence to acts, appearance, or speech which is wholly involuntary, would be impracticable and unreasonable, for almost every expression of thought or feeling can be simulated; and, although evidence of the conscious declarations of a person as indications of his state of mind has in it some of the elements of hearsay, yet it closely resembles evidence of the natural expressions of feeling, which has always been regarded in the law not as hearsay, but as original evidence,—1 Greenl. Ev. § 102, (5th Ed.) and when the person making the declarations is dead, such evidence is often not only the best, but the only, evidence of what was in his mind at the time. On principle, therefore, we think it clear that when evidence of the declarations of a person is introduced solely for the purpose of showing what the state of mind or intention of that person was at the time the declarations were made, the declarations are to be regarded as acts from which the state of

mind or intention may be inferred in the same manner as from the appearance of the person, or his behavior, or his actions generally. In the present case the declaration, evidence of which was offered, contained nothing in the nature of narrative, and was significant only as showing the state of mind or intention of the deceased.

But it is argued that this is not the law, and that it is not competent for this court to change the established rules of evidence. We have been shown no case exactly like the present, but there are decisions closely analogous, and, while they are not uniform, yet we think the weight of modern authority is in favor of admitting evidence like that offered in the present case for the purpose stated. The latest decision on the subject is *Hillmon v. Insurance Co.*, 145 U. S. 285, 12 Sup. Ct. 909, and many of the cases are cited in the opinion. See, also, *Puryear v. Com.*, 1 S. E. 512; *Blackburn v. State*, 23 Ohio St. 146; *Boyd v. State*, 14 Lea, 162; *Goersen v. Com.*, 99 Pa. St. 388; *Jumpertz v. People*, 21 Ill. 375; *Reg. v. Jessop*, 16 Cox. Cr. Cas. 204; *Com. v. Fenno*, 134 Mass. 217. It is argued that the decision of the supreme court of the United States in *Insurance Co. v. Mosley*, 8 Wall. 397, shows that that court is somewhat more liberal than our decisions warrant in admitting declarations as a part of the *res gestæ*, and that, therefore, this court will not follow the decision in *Hillmon v. Insurance Co.*, *ubi supra*. But, without considering whether we should follow *Insurance Co. v. Mosley* on the subject of *res gestæ*, we are aware of no difference in the decisions of the two courts on the admission of declarations to show the existing condition of the mind of the declarant, if we except our decision in *Com. v. Felch*, *ubi supra*, which we will consider hereafter. This court admits exclamations and declarations as evidence of existing pain in case of injuries. In the case of wills, upon the issue of sanity or undue influence, this court has always admitted evidence of declarations which tend to show the condition of the mind of the testator, and his intention with regard to the disposition of his property, or his fear of the person alleged to have exercised undue influence. *Shaller v. Binstead*, 99 Mass. 112; *Lewis v. Mason*, 109 Mass. 169; *May v. Bradlee*, 127 Mass. 414; *Potter v. Baldwin*, 133 Mass. 427; *Woodward v. Sullivan*, 152 Mass. 470, 25 N. E. 837; *Pickens v. Davis*, 134 Mass. 252. Upon an issue whether there was an intentional gift or gift *causa mortis* the same rule prevails. *Whitney v. Wheeler*, 116 Mass. 490; *Whitwell v. Winslow*, 132 Mass. 307; *Lane v. Moore*, 151 Mass. 87, 23 N. E. 828. In *Lane v. Moore* this court say: "Where the mental condition of a person at a particular time is in issue, his appearance, conduct, acts, and declarations, after as well as before the time in question, have been held admissible in evidence if sufficiently near in

point of time, and if they appear to have any tendency to show what that mental condition was. The question has usually arisen in cases involving the validity of wills, but the principle is the same where the validity of a gift is questioned, and where responsibility for crime is to be determined." See also, *Howe v. Howe*, 99 Mass. 88. It is to be noticed that in all these cases the person, evidence of whose declarations was admitted, was dead at the time of the trial. In actions by the husband for seducing his wife and alienating her affections from him the declarations and statements of the wife, made before the alleged seduction, indicating the state of her affections towards her husband, have uniformly been admitted upon the question of damages. *Palmer v. Crook*, 7 Gray, 418; *Jacobs v. Whitcomb*, 10 Cush. 255. In the last case the court say: "Whenever the mental feelings of an individual are to be proved, the usual expressions of such feelings are original evidence, and often the only proof of them which can be had." At common law the wife could not be a witness in such a case. In *Com. v. Abbott*, *ubi supra*, the defendant, who was not the husband, being on trial for the murder of a married woman, for the purpose of showing "the existence of motive on the part of the husband of the deceased to commit the crime," offered evidence that the husband and wife quarrelled some years before the homicide; that about six years before the homicide the husband was seen entering his own house with an axe in his hand, and that he then uttered threats against his wife and a man not named; and also offered to show the ill-feeling of the husband towards the wife, by statements not in the nature of threats, made by the husband to a witness. The evidence offered was confined to acts done or statements made on or before the year 1877. The homicide was in January, 1880. The reputation of the wife for chastity between the years 1873 and 1877 had been bad. There was uncontroverted evidence that from May, 1879, the reputation of the deceased was not questioned, and that the husband and wife continued to live together until her death. The justices trying the case excluded the evidence, and the defendant excepted. In that case this court say: "The existence of a criminal motive is an element which it is often necessary to establish in order to give character to the acts and conduct of a party charged with or suspected of crime. In such case the conduct or declarations of a party, both before and after the principal fact in issue, are admissible, provided they are sufficiently near in point of time, and sufficiently significant of the motive or intent to be proved. The rules which govern human conduct are to be reasonably applied in these cases, as in all other investigations of fact. They are to be so applied in all cases where the inquiry is as to the mental or moral condition of a person at the time a particular act

was done. The intent or disposition, when it constitutes an element of crime, can only be ascertained, as all moral qualities are, from the acts and declarations of the party." This court, after saying that a certain discretion must be left to the justices trying the case, held that it did not appear that the court erred in excluding the evidence offered because of its remoteness, and of a subsequent change in the relations of the husband and wife. The court also say, what has been said many times in criminal cases where it was contended that some other person than the defendant committed the crime, that "the existence of ill feeling as a motive for the commission of crime will not alone justify submitting to a jury the question of the guilt of a person entertaining such feeling. It becomes material only when offered in connection with other evidence proper to be submitted, showing that the person charged with such ill feeling was in fact implicated in the commission of the crime." There is no intimation anywhere in the opinion that if the evidence had related to a time very near the homicide, and if there had been evidence implicating the husband in the commission of the crime, evidence of his threats against the wife, and of his statements showing ill feeling towards her, would not have been admitted; and the language of the opinion implies that they would have been. The admission of evidence of declarations in *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208, and in actions involving the question of domicile,—*Kilburn v. Bennett*, 3 Metc. (Mass.) 199,—and in bankruptcy cases,—*Bateman v. Bailey*, 5 Term R. 512,—may perhaps be supported on the ground that the declarations were a part of the *res gestæ*; but, if these cases were not decided on this ground, they must be considered as applicable to the present case.

It is also argued that the deceased, with reference to the indictment, is not a party; and the question whether her declarations should be received as evidence is the same as if they were the declarations of any other person than the defendant, and that evidence of a confession by a third person that he killed the deceased, or threats to injure the deceased, made by him, cannot be received. The decisions appear to be uniform that confessions of third persons cannot be received as evidence that they committed the crime, and that the defendant did not; and this for the plain reason that they are hearsay. They are strictly narratives of past transactions, not made under oath, and are only competent as admissions against the persons making them. The decisions are not uniform whether evidence of threats made by third persons to injure the deceased should be admitted or not as evidence for the defendant. In most of the cases where the evidence of such threats by third persons has been rejected in trials for murder, the threats were made too long before the homicide to be significant,

or they were made under very different circumstances than those existing when the deceased was killed, or there was no other evidence tending to implicate these persons in the commission of the crime, and the evidence was rejected on one or all of these grounds. Evidence of threats of the deceased against the defendant has been admitted when the question was whether the defendant or the deceased made the first assault, and whether the defendant acted in self-defense. *Wiggins v. People*, 93 U. S. 465. If, on a trial for murder, the defendant proved that another person had ill will towards the deceased, and had an opportunity to commit the murder, and was found on the day when the murder was committed near the place of the murder, under suspicious circumstances, with a weapon which might have been the instrument with which the deceased was killed, and that the conduct of this person after the murder was such as to indicate that he had committed it, it would seem that evidence that this person, on the day before the murder, had threatened to kill the deceased if he could find him, and said that he was searching for him that he might kill him, would be significant of an intent to kill him, and ought to be admitted; and we find no well-considered case where, on this state of facts, such evidence has been rejected. See *State v. Beaudet*, 53 Conn. 536, 4 Atl. 237, and cases cited; *Holt v. State*, 9 Tex. App. 571; *Cluverius v. Com.*, 81 Va. 787, 826; *Walker v. State*, 63 Ala. 105; *Howard v. State*, 23 Tex. App. 266, 5 S. W. 231; *Puryear v. Com.*, *ubi supra*; *Worth v. Railroad Co.*, 51 Fed. 171. In *Com. v. Felch*, *ubi supra*, the defendant was charged with attempting to procure the miscarriage of Mary Ann Finley on July 2, 1881, by the use of some instrument to the jurors unknown, in consequence of which she died on the same day. He contended at the trial "that the operation was performed by Mary on herself; and there was evidence tending to show that it would have been possible for her to perform the operation on herself, considered as an operation, using for the purpose an ordinary lead pencil." He offered to prove by one Hughes "that in the month of June next preceding the time of the alleged offense Mary told her that she was pregnant by one Edward Titcomb, and that if Titcomb did not perform an operation to procure a miscarriage, or get some one to do so, she should perform the operation on herself with a lead pencil. It appeared that said declarations neither accompanied nor were explanatory of any act then done by her." The evidence was excluded, and the defendant excepted. This court, in the opinion, treat the evidence as hearsay, and say: "Such evidence is generally inadmissible. There are, however, several exceptions to this rule, and it is contended by the defendant that this evidence may properly be brought within some one of them. The only exception particularly designated is that re-

lating to pedigree. This is, indeed, one of the well-recognized exceptions to the general rule. That which is technically hearsay evidence is competent evidence upon a question of pedigree." An examination of the original papers shows that one of the contentions of the defendant was that the evidence that Mary said that Titcomb was the father of the child was some evidence in the case that he was the father, on the ground that it was a declaration in relation to the pedigree of the child; and the argument was that, if Titcomb was the father, and the defendant was not, it was improbable that the defendant would attempt to procure a miscarriage. The decision of the court that no question of pedigree was involved in the case, and that for the purpose of proving that Titcomb was the father of the child the evidence was hearsay, and inadmissible, is undoubtedly correct. But the counsel for the defendant in that case also contended that evidence of this declaration was admissible to show an intention in the mind of the deceased to perform the operation, in connection with the evidence that the operation was one which she might have performed. There are some passages in the latter part of the opinion which perhaps tend to show that this argument did not wholly escape the mind of the justice who wrote it, but this particular aspect of the evidence is certainly not considered, and no cases are cited, and the whole discussion in the opinion is that this point in the consideration of the case might not have received the attention it deserved. Upon a re-examination of the question, we are of opinion that under the circumstances shown in *Com. v. Felch* a part of the evidence should have been admitted for the purpose of showing the intention in the mind of the deceased, and that to this extent that decision must be overruled. It is not necessary, in the present case, to determine what limitations, if any, in practice must be put upon the admission of this kind of evidence, because all the limitations exist which have ever been suggested as necessary. The person making the declaration, if one was made, is dead. She had an opportunity to commit suicide, and it was competent for the jury to find that she had a motive to commit it; and the declaration, if made, was made under circumstances which exclude any suspicion of an intention to make evidence to be used at the trial. We cannot know whether the jury would or would not have found that the deceased was the person who had the interview with the witness, or whether they would have believed the witness, or whether, if they did believe her, they would have found that the deceased had really the intention which the declaration indicated, or whether the testimony, in view of all the evidence, would have affected the minds of the jury. We can only say that on the facts recited in the exceptions the evidence cannot be considered as immaterial or unimportant. We are of opinion that the pre-

siding judges erred in refusing to receive this evidence, and that, for this reason, the verdict against Trefethen must be set aside.

The remaining exceptions may be noticed, although it is not absolutely necessary to decide them. The first exception is to the refusal of the court to permit the counsel for the defendant to ask Charles E. Ray, one of the jurors, who was under examination by the court upon the voir dire, "to what extent he had read about the case in the newspapers." Ray was sworn as a juror, and sat as a juror at the trial. The court read to all the jurors summoned *Pub. St. c. 170, § 35*, and chapter 214, § 7, and then read a portion of what was said by Shaw, C. J., speaking for the full court in *Com. v. Webster*, 5 Cush. 295, 297, 298, viz.: "The statute intends to exclude any person who has made up his mind or formed a judgment in advance in favor of either side. Yet the opinion or judgment must be something more than a vague impression, formed from casual conversations with others, or from reading imperfect, abbreviated, newspaper reports. It must be such an opinion upon the merits of the question as would be likely to bias or prevent a candid judgment upon a full hearing of the evidence." The court also read the statement made by Chapman, C. J., speaking for the full court, in the trial of Samuel M. Andrews. Report of Trial of Andrews, by Charles G. Davis, p. 8. In the present case, the court, having put to the juror Ray all the statutory questions, which he had answered to its satisfaction, refused to permit the counsel for the defendant to put the question we have quoted above. The statutes we have cited, as also *St. 1887, c. 149*, undoubtedly contemplate that other questions besides the statutory questions may be put to jurors by the court, or by the parties or their attorneys under the direction of the court. *Pub. St. c. 170, § 35*, also provides that "the party objecting to the juror may introduce any other competent evidence in support of the objection." To determine whether a juror has such bias or prejudice that he does not stand indifferent in the cause is often a matter of a good deal of delicacy and difficulty, because persons most affected with bias or prejudice are sometimes the least sensible of it; but the extent to which the examination of the juror should be carried after the statutory questions have been answered has been said to be within the sound judgment and judicial discretion of the trial judge or judges. *Com. v. Burroughs*, 145 Mass. 242, 13 N. E. 884. It is plainly impossible to exclude every juror who has read in the newspapers some statement of the case, because this might exclude every intelligent man in the country. It is well known, however, that there is a growing tendency in certain newspapers to publish not only the evidence given in any preliminary hearing on a charge of crime, but all sorts of unverified rumors and of

crude opinions concerning the probable guilt or innocence of suspected persons. This reprehensible practice in a case which excites great popular interest may sometimes require extraordinary care on the part of the court in the selection of jurors, if the accused is to have an impartial trial. If the discretion of the court trying the case in the matter of the examination of jurors, after the statutory questions have been put and satisfactorily answered, is absolute, we cannot revise it; if it is not, we cannot say, as matter of law, on the somewhat meager statement contained in the exceptions, and in the absence of anything indicating what the counsel of the defendant had any reasonable exception in proving that the court erred in excluding the question.

The mother of the deceased, Mrs. Davis, testified to a conversation with the defendant on the morning of December 24th, a part of which is as follows: "I asked him where Tena was. He said he hadn't seen her. * * * Says I, 'Don't lie. She went out to meet you last night on the corner of Ferry street, and you have carried her off.' He said he had not. Said I, 'You have.'" The counsel for the defendant asked that this be stricken out, and objected to its admission. The court overruled the request, and admitted the testimony, and the defendant excepted. There are other examples of the admission of similar testimony against the objection of the defendant. It does not appear that the defendant testified as a witness in his own behalf, and no question arises of the admissibility of evidence to affect his credit as a witness. The exceptions recite that, "after Mrs. Davis had testified, the commonwealth introduced a large amount of testimony relating to the conduct of Trefethen after the disappearance of Tena, including statements, declarations, conversations, and conduct of Trefethen with Mrs. Davis" and other persons named, the general character of which is set out in the exceptions; and "that at the interview with Mrs. Davis on the morning of December 24th, when accused by her of Tena's disappearance, he [Trefethen] shed tears, and was greatly excited; and also * * * that at various times in these interviews, during the period between December 23d and January 10th, he met the statements quoted in this bill, made to Mrs. Davis by Tena, and repeated to him by Mrs. Davis or the officers, in various ways, sometimes by explicit denial, sometimes by silence, and sometimes by equivocal expressions, such as 'it must be a mistake,' 'it is all a mistake,' 'it must be some other party;' from all which evidence the commonwealth claimed and argued, without objection, that these denials of his relations with Tena, of her seduction, of the appointment with her for the evening of December 23d, and his connection with her disappearance and death, were false, and were made to protect himself against the charge of mur-

der." If a defendant is charged with crime, and unequivocally denies it, and this is the whole conversation, it cannot be introduced in evidence against him as an admission. *Fitzgerald v. Williams*, 148 Mass. 462, 20 N. E. 100. If any part of a conversation with the defendant put in evidence tends to show, directly or indirectly, that he is guilty of the crime charged, the defendant has the right to have put in evidence all that was said to and by him at the same time and relating to the same subject, although it is in his favor. *Com. v. Keyes*, 11 Gray, 323. When a statement is made in the presence and hearing of a defendant, which, if true, tends to show that he is guilty, and he remains silent, or makes an equivocal reply, the rule of law has been stated to be as follows: "The rule is that a statement made in the presence of the defendant, to which no reply is made, is not admissible against him, unless it appears that he was at liberty to make a reply, and that the statement was made by such person, and under such circumstances, as naturally to call for a reply, unless he intends to admit it. But if he makes a reply wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence. *Com. v. Kenney*, 12 Metc. (Mass.) 235; *Com. v. Galavan*, 9 Allen, 271." *Com. v. Brown*, 121 Mass. 69, 80. See *Com. v. Densmore*, 12 Allen, 535. *Com. v. Brown* was an indictment for procuring the miscarriage of one Ann Powers, otherwise called Emma L. Smith, and one Frances Ordway, otherwise called Frances A. Chase. In that case one George, a police officer, testified that he "took the defendant into the presence of Emma L. Smith and Frances A. Chase, and asked them in the defendant's hearing and presence if they knew him. Both said that they knew him. One knew him as Dr. King, the other knew him as Dr. Brown. I asked them if he performed an operation on them. They said he did. The defendant asked if they had been operated on previously by any other person. They said, 'No,' etc. This testimony was admitted against the objection of the defendant. The full court say: "In this case, when Emma L. Smith and Frances A. Chase stated that the defendant had performed an operation on them, he did not remain silent, but asked them in reply if they had been previously operated upon by another person. The jury might infer from this an admission by him of the truth of their statements." It is obvious that when the reply of a defendant to a statement made to him, which, if true, tends directly or indirectly to prove that he is guilty of the crime charged, is not an unequivocal affirmation or denial of the truth of the statement, difficult questions must often arise in determining whether the reply is of such a character that it has any tendency to show a consciousness of guilt which will warrant its admission as evidence against him. Per-

haps a certain discretion must be left to the presiding judge or judges, in view of all the circumstances of the case. The same is true when the conduct and declarations of the defendant are put in evidence for the purpose of showing a consciousness of guilt on his part. See *Com. v. Piper*, 120 Mass. 183, 189.

The exceptions in the present case do not set out verbatim the whole conversation between Mrs. Davis and the defendant on the morning of December 24th, and of that set out we cannot say, as matter of law, that some of the replies were not such as to warrant their admission as evidence against the defendant. If these were admitted, the defendant had the right to have the whole conversation on that subject put in evidence. The logical effect of an unequivocal denial of guilt, if it have any effect, is in favor of the defendant; and the admission of the denials of the defendant, if the jury properly considered the evidence, was in favor of the defendant. This is shown in the attempt, often made by a defendant when the government has introduced evidence of a confession made on one occasion, to introduce evidence that on other occasions he has denied that he was guilty. While evidence that the defendant has made false statements in regard to many facts which are relevant to the issue is admitted against him as tending to show his guilt, it is not competent for the government to contend that a denial of guilt is of itself evidence against the defendant. To argue that by the other evidence the defendant is shown to be probably guilty, and that therefore his denial of guilt is false, and is additional evidence against him, ought not to be permitted. When a defendant in a criminal case is shown to have made certain false statements of facts, and these facts are relevant to the issue, the fact that the defendant has knowingly made the false statements may have some tendency to show that he is guilty; but the jury must first be satisfied beyond

a reasonable doubt that the defendant made the statements, and that they were false, and that the defendant knew that they were false, before any weight can be given to this evidence, unless the statements of themselves have some tendency to show his guilt. But when the defendant denies generally that he is guilty, this statement cannot be shown to be false, except by proving that he is guilty beyond a reasonable doubt; and then it is unnecessary. If there is a reasonable doubt of his guilt on all the other evidence, the fact that he unequivocally denied his guilt is not, of itself, evidence against him; and the denial cannot be assumed to be false because it has not been proved to be false by sufficient evidence. Some of the denials of the defendant in the present case were denials of facts which were relevant to the issue, and not a general denial of guilt, and we do not know whether the evidence was not such as to satisfy the jury beyond a reasonable doubt that these denials were knowingly false. Some of the evidence recited was competent on the ground that the conduct or replies of the defendant, in view of the statements made to him, had some tendency to show guilt on his part. If in one conversation some of the replies of the defendant had some tendency to show guilt, and some were explicit denials of guilt, we cannot say that the defendant has been prejudiced by the admission in evidence of all that was said at that interview directly or indirectly relating to his guilt or innocence if the jury were properly instructed upon the application to be made of this evidence. We cannot presume that the court did not take pains properly to instruct the jury upon the legitimate use to be made of the evidence admitted, and warn the jury that the statements made to the defendant were not to be considered, in and of themselves, as any evidence of the facts stated. On this part of the case the exceptions disclose no error of law.

Verdict against Trefethen set aside.

JENSEN v. McCORKELL.

(26 Atl. 366, 154 Pa. St. 323.)

Supreme Court of Pennsylvania. April 17, 1893.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Anna M. Jensen against John G. R. McCorkell. From a judgment for plaintiff, defendant appeals. Affirmed.

William Gorman, for appellant. Ernest L. Tustin, for appellee.

STERRETT, C. J. This suit is on a note at 90 days from March 28, 1890, made by Rodger Convery to the order of P. C. Convery, indorsed by him and by the defendant, etc. It is conceded the note was duly presented to the maker at maturity and protested for nonpayment. The only question was whether defendant was legally notified of the dishonor of the note. Alonzo R. Rutherford, the notary by whom it was protested, testified in substance, that on the day named he inclosed notice of protest in an envelope addressed to defendant, "Philadelphia Driving Park, Philadelphia," his then place of residence in said city, and mailed the same on that day in the Philadelphia post office. He further testified that on the envelope in which he sent the notice the words "Return to Alonzo R. Rutherford if not delivered," etc., were stamped, and that said letter was never returned to him. It was also in evidence that the then United States carrier delivery service did not cover "Philadelphia Driving Park," but those who resided there, including defendant, received their mail matter regularly at the sub post office or station located in that section of the city near defendant's residence. The defendant denied having received the notice of protest; and his man of business, who was accustomed to call at the sub post office daily, once, twice, and occasionally thrice, for his employer's mail, and sometimes, in his absence, opening the same, testified that he knew nothing of the receipt of said notice. No points for charge were submitted to the court by either party. After referring to plaintiff's evidence, tending to show that the notice of protest was duly mailed to and received by defendant, and also to defendant's rebutting testimony, the learned judge instructed the jury to find, from all the evidence before them, whether or not the notice was sent and reached defendant's place of business, and, among other things, said: "If it came to either of them, it was a sufficient notice, within the requirements of the law, if it came within a reasonable time;" and that "the date, July 12th, which has been mentioned in the course of the case, would be too late."

Considering the two specifications in their inverse order, we think defendant unjustly complains of the court for not charging the

jury that, "under all the evidence in the case, their verdict should be for the defendant." The learned judge was not requested to thus instruct the jury, and thereby withdraw the case from their consideration. If such instruction had been asked, in view of the evidence referred to, it would have been error to have given it.

The only other specification is the following excerpt from the learned judge's charge: "The United States government has taken hold of the distribution of the mails, and, in the city of Philadelphia, letters deposited in the mail are delivered daily; and, where there is upon the back of an envelope a stamp of the name of the person who sends letters, the letters are returned if they are not delivered." "Under this condition of things, I instruct you there is a presumption, when the letter is mailed to the proper address within the city, that it is delivered in accordance with the direction." The plaintiff's evidence, as we have seen, was to the effect that, on the day the note was dishonored, a notice of protest, properly addressed to defendant, was deposited in the Philadelphia post office. In due course of mail the letter thus deposited by the notary would be properly transmitted to the sub post office, in the vicinity of defendant's residence, where he was accustomed to regularly receive his letters and other mail matter. The plaintiff's evidence on that subject was sufficient to warrant the jury in finding the fact on which their verdict is necessarily predicated, viz. that the letter reached its destination—defendant's place of business or residence—by due course of mail, etc. As we said in *Whitmore v. Insurance Co.*, 148 Pa. St. 405, 23 Atl. Rep. 1131, it is well settled that the fact of depositing in the post office a properly addressed, prepaid letter raises a natural presumption, founded in common experience, that it reached its destination by due course of mail; in other words, it is prima facie evidence that it was received by the person to whom it was addressed; but that prima facie proof may be rebutted by evidence showing it was not received. The question is one of fact solely for the determination of the jury under all the evidence. *Folsom v. Cook*, 115 Pa. St. 549, 9 Atl. Rep. 93; *Susquehanna M. F. Ins. Co. v. Tunkhannock Toy Co.*, 97 Pa. St. 424; *Huntley v. Whittier*, 105 Mass. 391; *Briggs v. Hervey*, 130 Mass. 188. In the case at bar that presumption is strengthened by the undisputed evidence that the name and address of the notary were stamped on the envelope covering the notice of protest. So greatly, indeed, does that fact strengthen the presumption, that it becomes well-nigh conclusive. At least it would be entitled to considerable weight in connection with other facts and circumstances in the case. In view of the evidence, and submission of the questions arising thereon to the jury, their verdict, in favor of plaintiff, by necessary implication establishes the

facts that the notice of protest, properly addressed and mailed to defendant, was promptly transmitted to the sub post office in the vicinity of his well-known residence at "Philadelphia Driving Park," and was	there received by him or some one authorized to receive the same from that office. That is sufficient to fix his liability as indorser.
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Judgment affirmed.

STATE v. MINTON et al.
(22 S. W. 808, 116 Mo. 605.)

Supreme Court of Missouri. Division No. 2.
June 13, 1893.

Appeal from circuit court, Clinton county;
James M. Sandusky, Judge.

William E. Minton and George W. Seasholts were convicted of forging a deed in the name of a fictitious person, and they appeal. Reversed.

Huston & Parrish, for appellans. R. F. Walker, Atty. Gen., for the State.

BURGESS, J. At the March term, 1891, of the criminal court of Buchanan county, Robert F. Zook, William E. Minton, and George W. Seasholts were indicted for making and forging a false and forged deed purporting to be the act of one Youngberger, a fictitious person, to convey certain land in Stone county, Mo., to one Rachel Cross. The indictment is in two counts. On a trial, Zook was acquitted. Afterwards a change of venue was awarded the defendants Minton and Seasholts, to the circuit court of Clinton county, where on trial had at the January term, 1892, of said circuit court of Clinton county, defendants were acquitted on the second count, and found guilty on the first count, in the indictment, and the punishment of each one fixed at 10 years' imprisonment in the penitentiary. The count of the indictment under which defendants were convicted, leaving out the formal parts, is as follows: " * * did unlawfully and feloniously and falsely make and forge a certain false and forged deed, purporting to be the act of one William T. Youngberger, a fictitious person, by which a right and interest in certain real property, which in said deed purports to lie and be situate in the county of Stone, state of Missouri, and which in said deed was described as follows, to wit, all the east one-half of the northeast quarter of section number eighteen, township number twenty-three, range number twenty-four, containing eighty acres, more or less, purported to be conveyed and transferred to one Rachel Cross, with intent then and there and thereby to defraud, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Missouri." After conviction, defendants filed their motion for new trial, and in arrest, which being overruled, they appealed to this court.

The first contention on part of defendants is that there is no evidence to support the verdict. This court has so often decided that it will not interfere with a verdict unless it is evident that it is the result of passion, prejudice, or partiality on the part of the jurors that it is scarcely necessary to cite authorities on that point. *State v. Nelson*, 98 Mo. 414, 11 S. W. 997, and authorities cited; *State v. Howell*, 100 Mo. 628, 14

S. W. 4; *State v. Glahn*, 97 Mo. 679, 11 S. W. 260. We are not prepared to say that there is a total failure of evidence, or that it is so weak as to justify the inference that the verdict is the result of passion, prejudice, or partiality. In fact the evidence leaves room for little doubt, if any, of their guilt.

The action of the trial court in admitting evidence as to other transactions with other parties, and in admitting in evidence other deeds than the one described in the indictment, and in admitting proof of the declarations of the defendants with reference thereto, is assigned for error. There was sufficient foundation laid to justify the admission and statements of the defendants, as against either or both, while their relations existed as partners in dealing in real estate, and the sale of lands, and the execution of deeds therefor, as charged in the indictment. The evidence tends strongly to show that they were engaged in one common enterprise, selling and trading lands in the county of Stone, in the name of Youngberger, enjoying the proceeds and profits arising from such transactions, and that while thus engaged they entered into a conspiracy to defraud, by selling lands to which they nor Youngberger, in whose name the conveyances were made, so far as the evidence tends to show, had any right or title. Alonzo Cross, a witness for the state, testified that he made the trade for the land described in the indictment with the defendant Seasholts, and that Seasholts told him that the title thereto was good, that Youngberger lived near Plattsburg, and that he traded a good deal in lands. Dillard, also a witness for the state, stated that the defendants told him that Youngberger lived in Stone county, Mo., and that he went from St. Joe to Kansas; that he traded with defendants for a tract of land, also in Stone county; and that the deed was signed by Youngberger, and delivered to him by defendant Seasholts. Charles T. Miller, another witness for the state, testified that he made a trade with defendant Minton for a tract of land in Stone county, which Minton caused to be deeded to him (witness) by William T. Youngberger, and that he got the impression from what Minton said that Youngberger was a traveling man, and was at that time connected with the coal business in the city. John Howard, also a witness for the state, testified that he had another and still different deal for a tract of land in Stone county, with defendant Minton, and that he stated to witness that he would give him a good warranty deed, a clear title, and a good abstract; that this conversation occurred late in the evening; that Minton said Youngberger was not there then, but he would make his deed out, and that he (witness) could come in the morning and get it, which he did. It also purported to have been executed by Youngberger. George Howard, also

a witness, testified on behalf of the state that he had a similar transaction with defendant Minton for land in Stone county; that Minton caused deeds to be executed to him in the name of Youngberger, and stated to him that Youngberger was a banker in Atchison, Kan. Similar statements were made by defendants to other persons who were witnesses, on different occasions, which were contradictory, and, when taken in connection with the other facts and circumstances in proof, show conclusively that there was a conspiracy existing between the defendants to defraud, and justified the admission of proof of the statements of the one against the other, as long as such conspiracy existed. *State v. Melrose*, 98 Mo. 594, 12 S. W. 250.

There was no error in admitting in evidence deeds other than the one described in the indictment. While such deeds had a tendency to show that defendants were guilty of other crimes than the one with which they stand charged, and were upon trial, they were not for that reason, alone, inadmissible, but they were admissible for the purpose of showing the intent with which the act was done, being as they were of similar character, executed, not only in the same place, but purported to be signed and acknowledged by the same party, (Youngberger,) and several of them purported to have been acknowledged before the same notary. This subject underwent an exhaustive review by this court in the case of *State v. Myers*, 82 Mo. 558, and under the ruling in that case the deeds were clearly admissible for the purpose of showing guilty knowledge on the part of defendants. *State v. Bayne*, 88 Mo. 604.

The court, over the objections of the defendants, allowed the jury, at the suggestion of the prosecuting attorney, to compare the signature of William T. Youngberger, as it appeared on the deed from him to George Seasholts, and the two deeds from him to Howard, with the signature of Youngberger to the deed described in the indictment. They were no part of the record in the case, not admitted to be in the handwriting of either one of the defendants, and clearly inadmissible for the purpose of comparison. "When there are other writings in the case, conceded to be genuine, they may be used as standards of comparison, and the comparison may be made by the jury, with or without the aid of experts. 1 Greenl. Ev. § 578; *State v. Scott*, 45 Mo. 302; *State v. Tompkins*, 71 Mo. 614. But, with us, such papers can only be used when no collateral issue can be raised concerning them. 1 Greenl. Ev. § 581; *State v. Clinton*, 67 Mo. 380." The signatures on the deeds, other than the one described in the indictment, did present collateral issues; and the jury should not have been permitted to compare the signature of Youngberger, on them, with the one described in the indictment. *Rose*

v. Bank (Mo. Sup.) 3 S. W. 876, and authorities cited. It is only when the writing offered in evidence is connected with the case on trial, or is admitted to be genuine, that it is the subject of comparison with the writing in controversy, or, as in this case, that which the defendants are charged with having signed the name of some fictitious person thereto, unlawfully.

There was no error in permitting the witness Eugene Spratt to testify that the name of William T. Youngberger, signed to the deed described in the indictment, was in the handwriting of the defendant Seasholts. He had already testified that he was acquainted with the handwriting of Seasholts, and that was all that was necessary in order to qualify him to testify in the case, and to give his opinion as to whether or not the name signed to the deed was in the handwriting of defendant Seasholts. *Fash v. Blake*, 38 Ill. 363; *Clark v. Freeman*, 25 Pa. St. 133; *Watson v. Brewster*, 1 Pa. St. 381; *Garrells v. Alexander*, 4 Esp. 37.

Nothing, however, that was said by either of the defendants after the conspiracy ended, and not in the presence of the other, was admissible in evidence against the one not making the statements or admissions. *State v. Melrose*, 98 Mo. 594, 12 S. W. 250; *State v. Hilderbrand*, 105 Mo. 318, 16 S. W. 948; *State v. McGraw*, 87 Mo. 161.

The admission of the postal card purporting to have been written by L. H. Smith, recorder, and addressed to L. L. Martin, St. Joseph, Mo., dated Galena, Mo., October 1, 1890, was immaterial, hearsay, and inadmissible for any purpose. Its effect could only have been injurious to the defendants, and should have been excluded.

While the instructions, or some of them, at least, are subject to verbal criticism, taken as a whole, they presented the case very fairly to the jury, and as favorably to the defendants as they could expect. There is no objection to them, when taken altogether, that would justify a reversal.

We come now to the consideration of the sufficiency of the indictment. Section 3653, Rev. St. 1889, under which it is drawn, is as follows: "The false making, forging, or counterfeiting any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation, or any right, interest, or claim to money, right in action, or property, shall be, or purport to be, or intended to be, conveyed, transferred, created, increased, discharged, diminished, or in any manner affected, to which shall be affixed a fictitious name, or the name of any person, or pretended signature of any person, not in existence, shall be deemed a forgery, in the same degree and in the same manner as if the name so affixed was the name of a person in being, or purporting to be the signature of a person in existence." The indictment is manifestly bad, and charges no offense against the de-

fendants. It does not allege that a fictitious name or pretended signature of any person not in existence was affixed to the deed described in the indictment. This is absolutely necessary, under the statute, unless the deed is set forth according to its tenor, showing the fact to be that the name of the fictitious person was affixed to the deed. "And when the tenor is exact and complete, and sufficiently gives the purport, then the purporting clause may be rejected as surplusage." 1 Whart. Cr. Law, § 737. The purport of the instrument necessarily appears when the instrument is set forth according to the tenor. 2 Russ. Crimes, (9th Ed.) 805; 3 Chit. Cr. Law, 1041; State v. Yerger, 86 Mo. 33. While the indictment in

this case does allege that the defendants did unlawfully and feloniously make and forge a certain false and forged deed, purporting to be the act of one William T. Youngberger, a fictitious person, it does not allege that a fictitious name, or the name of any person not in existence, was affixed thereto, nor does it set out the deed in full. We must, therefore, for these considerations, hold that it does not charge the defendants with any criminal offense. The judgment is reversed, and arrested, and cause remanded, with directions that the indictment be quashed, and defendants held to answer a new indictment to be preferred against them by the grand jury of Buchanan county. All incur.

COMMONWEALTH v. RUSSELL.

(30 N. E. 763, 156 Mass. 196.)

Supreme Judicial Court of Massachusetts.
Suffolk. April 25, 1892.

Exceptions from superior court, Suffolk county; Daniel W. Bond, Judge.

Charles H. Russell was convicted of forgery, and excepts. Exceptions overruled.

Geo. C. Travis, for the Commonwealth.
Frank M. Davis and Chas. F. Spear, for defendant.

BARKER, J. It is an established exception to the rule forbidding proof of collateral facts that in prosecutions for forgery and for uttering forged paper proof is admissible, in order to show an intent to defraud by the forgery, and also to show knowledge on the part of the accused with reference to the particular document which he is charged with uttering, that at or near the time of committing the alleged offense he had passed or had in his possession other similar forged documents. *Com. v. Miller*, 3 Cush. 243, 250; *Com. v. Stone*, 4 Metc. (Mass.) 43, 47; *Rex v. Ball, Russ. & R.* 132; *Rex v. Wylie*, 1 Bos. & P. (N. R.) 92; *Rex v. Smith*, 2 Car. & P. 633; *Sunderland's Case*, and other cases, 1 Lewin, Cr. Cas. 102-104; *Rex v. Whiley*, 2 Leach, 983; *Com. v. White*, 145 Mass. 392, 395, 14 N. E. 611. The admission of such evidence is necessary, because guilty knowledge is a fact not susceptible of proof by direct evidence, and can rarely be shown by explicit admissions, but only by acts and conduct. Intent to defraud often sufficiently appears from the circumstances of the transaction, where its immediate and necessary effect is to defraud; but there are many cases of the false making of instruments which have no such necessary effect, and in which the fraudulent intention must be proved by other and collateral circumstances. Although the introduction of such evidence compels the defendant to meet acts not charged, and may lead the jury to convict of one crime upon proof of another, it is admitted when the occasion arises. *Com. v. Stone*, *ubi supra*; *Com. v. Tuckerman*, 10 Gray, 173, 206. This doctrine is a branch of a more general exception, which, when knowledge or intent must be proved, allows evidence of acts not in issue, but which tend to show such knowledge or intent,—as in the trial of indictments for passing counterfeit money, (*Com. v. Price*, 10 Gray, 472, 476; *Com. v. Hall*, 4 Allen, 302; for obtaining goods upon false pretenses, (*Com. v. Stone*, *ubi supra*;) for embezzlement, (*Com. v. Eastman*, 1 Cush. 216; *Com. v. Miller*, 3 Cush. 250; *Com. v. Tuckerman*, *ubi supra*; *Com. v. Shepard*, 1 Allen, 575;) and for adultery, (*Com. v. Merriam*, 14 Pick. 519, 520.) As said by Bigelow, C. J., in *Com. v. Shepard*, *ubi supra*, "it is essential to the rights

of the accused that when such evidence is admitted it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose for which it is competent." In the case at bar the defendant was tried upon an indictment charging him with the forgery of a check upon a bank, purporting to be drawn to his order by one Andrews, and, in a second count, with uttering the same check, knowing it to have been forged. It was shown that when arrested he had three other checks upon the same bank, payable to his own order, one of which purported to be drawn by Andrews; and evidence, consisting in part of his own alleged confessions, was admitted, subject to his exception, tending to show that the checks found upon him, and also two others passed by him about the same time as the one set out in the indictment, were forgeries. Under the principle above stated, all the evidence excepted to was competent, both to show his knowledge that the check set out in the indictment was forged, and that his purpose in the forgery and the uttering was to defraud. It is to be presumed that correct and appropriate instructions, to enable the jury to make a proper application of the evidence, were given. *Com. v. Shepard*, 1 Allen, 575, 582; *Adams v. Nantucket*, 11 Allen, 203, 205.

Reserving for the present the questions raised as to the alleged confessions, these considerations require us to overrule the other exceptions to the admission of evidence, and also to that portion of the charge which allowed the jury, on the question of the defendant's intention to defraud by the forgery, to consider the fact that he had in his possession at the time of his arrest other forged checks.

2. The defendant excepted to the admission of evidence of his alleged confessions. Before such evidence was received, the witnesses were examined by the defendant's counsel with reference to any inducements or statements made to him by the officers, and the bill of exceptions states that it appeared that no inducements were held out. When the examination disclosed that his statements related in part to the other checks above mentioned, the defendant's counsel objected to the admission of any statement or confession about checks other than the one mentioned in the indictment, and excepted to all evidence of his statements as to the other checks; but, as all the statements were pertinent to the question whether the checks were forgeries, and as that question was in law pertinent to the issue, the evidence was competent. During the charge the court instructed the jury that, if the testimony of the officers showed that any inducement or hope of reward was held out to the defendant, they were to disregard any confession that might have been testified to. At the close of the charge

the defendant requested the court to further instruct the jury "that if they believed, taking all the circumstances of the case into consideration, that the officers held out any inducement or hope of reward to defendant if he would confess, their testimony as to any confession or admissions which might have been made by the defendant must be disregarded." As there was no evidence bearing upon this question, except the testimony of the officers, the instruction given and that requested were the same, in substance, and that requested was properly refused.

3. There was no evidence that Andrews ever had an account with the bank on which the check purported to be drawn, or any right to draw upon the bank. The court refused to rule that for this reason

there was no evidence to warrant a conviction, or that there was a variance between the allegation and the proof, in that the words "order for money" in the indictment implied a mandatory power in the maker of the check, while upon the proof it did not appear that Andrews had any right to command the bank to pay the check, or any check. These requests were properly refused. The indictment alleges the making and uttering of a false order for money of a certain tenor. Whether, if the false order had been genuine, it would have been a document which the bank on which it purported to have been drawn would have been bound to honor, or even whether or not there was such a bank, was not alleged in the indictment, and was immaterial. Exceptions overruled.

CONTINENTAL INS. CO. OF CITY OF
NEW YORK v. INSURANCE CO.
OF PENNSYLVANIA.

(2 C. C. A. 535, 51 Fed. 884.)

Circuit Court of Appeals, Second Circuit.
March 15, 1892.

Error to the circuit court of the United States for the Southern district of New York.

At Law. Action by the Insurance Company of the State of Pennsylvania against the Continental Insurance Company of the City of New York to recover \$33,105, with interest. Defendant in its answer, by way of counterclaim, demanded judgment against plaintiff for \$5,252.88, with interest. Verdict for plaintiff in the sum of \$16,420.73, and motion for new trial denied. Judgment for said amount, and for interest thereon, the whole amounting to \$18,732.20. Defendant brings error. Affirmed.

Butler, Stillman & Hubbard (Thomas H. Hubbard and John Notman, of counsel), for plaintiff in error. Evarts, Choate & Beaman (Treadwell Cleveland, of counsel), for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. This is a writ of error by the defendant in the suit below to review a judgment of the circuit court for the plaintiff entered upon the verdict of a jury. The assignments of error impugn the rulings of the trial judge in admitting evidence, and in refusing to instruct the jury to find a verdict for the defendant as to all, and especially as to several, of the causes of action in controversy. Error is also assigned of some of the instructions given to the jury.

The complaint contains 23 counts, each of which sets forth a different and distinct cause of action. Each of them charges that, by the fraudulent acts of an agent employed by both the plaintiff and defendant, the plaintiff was made to pay to a third party a sum of money which should have been paid by the defendant. The averments general to all are, in substance, that in the years 1882 and 1883 one Lorenzo Dimick was the general agent at Buffalo of the plaintiff, the defendant, and also of the two other insurance companies having local agents in other places, who accepted applications and issued certificates for marine insurance; that the general agent conducted at Buffalo the whole business of inland marine insurance for the several companies, and, in the usual course of his business, issued policies of insurance and effected reinsurances in behalf of the several companies for risks accepted by him, or by the local agents, and adjusted all losses arising in the business by drawing drafts on the company insuring, or paying them, and charging the amount against its moneys in his hands. Seventeen of the counts set forth causes of

action of a similar character, and, in effect, allege that, after Dimick had received information of a marine peril affecting a particular risk which had been insured by the defendant, he fraudulently shifted the risk, or some part of it, upon the plaintiff, by reinsuring it in the name of the plaintiff, and, when loss ensued which the defendant was in fact liable to pay, he caused the plaintiff to pay it as a reinsurance upon the risk; that each of the payments so made was received by the defendant, and was obtained through the fraudulent acts of Dimick, done with the intention of cheating and defrauding the plaintiff for the benefit of the defendant. These 17 causes of action relate to different risks, and involve different voyages, dates, and amounts. The fifteenth and nineteenth counts contain similar averments, except that the risks were first insured by the defendant, and, after information of peril or disaster was received, Dimick substituted the plaintiff as the original insurer. Four of the other counts, the twentieth to the twenty-third, inclusive, are for similar causes of action, except that they allege that risks were originally insured by the plaintiff, and had been reinsured by the defendant, but, after news of peril or disaster, the reinsurance was concealed so as to relieve the defendant from the whole or part of its obligation. It appeared upon the trial that separate books were kept by Dimick for each company, in which the particulars of the insurances and reinsurances were entered; that the local agents who accepted applications and issued certificates for insurance transmitted reports, called "daily reports," to Dimick, specifying the particulars of the risks taken by them; that the particulars of these risks were entered in the books kept at Buffalo; that twice in each week Dimick reinsured risks which had been taken by the local agents, distributing the amount of reinsurance between the several companies as he saw fit; and that reports were forwarded by him, showing the particulars of risks insured or reinsured, daily to the defendant, and twice in each week to the other companies. According to his course of business with the plaintiff and the defendant, he was to remit to each on the 20th of every month all moneys in his hands belonging to it, and render to each a full abstract of his business with it, including a statement of losses paid and the proofs relating to the same. The evidence authorized the jury to find that in many cases, after a risk had been insured by a local agent with the defendant, or by Dimick himself, he received news of peril, by telegram or otherwise, and would reinsure the risk with one or more of the other companies, by causing appropriate entries to be made in the books, and, in some cases, would cancel the original insurance, and substitute one or more of the other companies in the place of defendant, and, if the risk had been originally insured with the plaintiff, or either of the companies other than the de-

defendant, and reinsured in part with the defendant, would cancel the reinsurance with the defendant, and transfer it to one or more of the other companies; that in these cases the reports transmitted by him to the several companies would not give any information of the real transaction, but only of the substituted insurance; that when a loss was incurred in any of these cases, he would adjust it on the basis of the fraudulent insurance or reinsurance, and obtain payment thereof from the company or companies apparently liable therefor, by drawing drafts, or by charging the amount against funds in his hands, thus exonerating the defendant to the extent to which he had fraudulently relieved it of its original obligation; and that all this was done by means of fraudulent instructions by Dimick to his clerks, by fraudulent entries in his books and papers, and by fraudulent statements in his reports and accounts rendered. Evidence was given by the plaintiff upon the trial tending to prove the particular frauds in suit, and also tending to prove similar frauds by Dimick, committed in some instances as part of the same transaction, and in others in a different transaction, about the same time, by which he shifted losses of the defendant upon one or both of the other two companies. The theory of the case for the plaintiff was that these frauds were part of a deliberate system devised by Dimick to defraud the plaintiff for the benefit of the defendant, from motives of personal interest on his part. The evidence did not show that defendant had any knowledge of the fraudulent acts of Dimick.

In considering the assignments of error, those only will be noticed which have been relied upon at the bar, and in the brief of the counsel for the plaintiff in error. As to those which relate to the admission of evidence, a few general considerations are pertinent. In actions founded upon fraud, where intent is a necessary ingredient, the largest latitude is allowed in the introduction of evidence, circumstantial as well as direct, to disclose the motive and prove the fraud; and any evidence having a tendency to prove the offense, though it may be slight, is not incompetent. Such actions necessarily give rise to a wide range of investigation, for the reason that the motive of the defendant is involved in the issue. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry, or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other, and circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. *Castle v. Bullard*, 23 How. 172, 187; *Hubbard v.*

Briggs, 31 N. Y. 518, 538; *Beardsley v. Duntley*, 69 N. Y. 577, 581.

The case of fraud is one of the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge; and it is the settled rule that, to establish fraud in a given transaction, evidence is admissible to show the commission of similar frauds in similar transactions had with other persons about the same time. *Lincoln v. Clafin*, 7 Wall. 132; *Butler v. Watkins*, 13 Wall. 456; *Insurance Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877. It was entirely competent for the plaintiff to show that, during the period covered by the frauds in suit, Dimick was committing other and a series of similar frauds upon the other insurance companies for the benefit of the defendant. All the entries made in Dimick's books or papers by his clerks, pursuant to his directions, were the acts of Dimick, and the entries themselves, as well as his instructions, general or special, to the clerks, were verbal acts, and, as such, a part of the *res gestæ* of the transactions which were sought to be shown. The evidence was therefore properly admitted, which tended to show that, in shifting any one of the particular losses in suit from the defendant to the plaintiff, Dimick did so by reinsuring it in part with the plaintiff, and in part with the other two companies for which he was an agent; or which tended to show that, in independent transactions occurring about the same time, he committed similar frauds, or attempted to, upon one or both of the other two companies; and the books and papers containing the entries by means of which these frauds were in part effected, as well as testimony of the general and special instructions of Dimick to his clerks, were competent evidence. It is of no consequence whether the evidence consisting of such entries was introduced and admitted upon a different theory of its competency; it was competent for the reason stated, and, if it also tended to corroborate witnesses whose credibility was doubtful, that circumstance did not impair its competency.

We proceed to notice more particularly some of the rulings in admitting testimony which are complained of. The pages from the insurance registers kept by Dimick contained, it is true, entries as to many risks which were in no wise concerned with this case, but no specific objection was taken on that ground. The pages were offered and marked as exhibits, properly so, even if for identification only, and the plaintiff proved and read the entries upon them relating to insurances of risks taken on vessels which were the subject of the action. To these objection was taken as immaterial and irrelevant, and in the light of that objection only is the action of the trial judge to be reviewed. He cannot be held to have erred in allowing the jury to see the entries as

they stood on the pages, in the absence of a specific request that the other entries on the page should in some way be kept from them, and, in the absence of anything to that effect on the record, we cannot assume that he allowed entries which so plainly had nothing to do with the case to be read to the jury. *People v. Dimick*, 107 N. Y. 13, 25, 14 N. E. 178. The entries which were read to the jury against the defendant's objection were in each instance indisputably parts of the transaction in question, which was as much a reinsurance of the defendant as it was an insurance in the plaintiff. The proposition to be established was that reinsurances of the defendant's risks were effected with the plaintiff, after notice of disaster, to save it from loss. Dimick's relations with the three reinsuring companies were such that he was able to effect reinsurances in all of them without exciting suspicion. The single fact that, in the case of the Ackley, for instance, where the defendant had \$38,900 at risk, only the comparatively small sum of \$2,500 was reinsured in the plaintiff, might indicate the mere exercise of ordinary discretion; but simultaneous reinsurance of all the amount at risk, (except \$5,000,) in the other companies, might well be persuasive to the inference that he did so after the receipt of information that led him to believe the vessel was a loss, other evidence tending to show that whenever there was no loss there was no reinsurance. If the transaction, as plaintiff claimed, was an effort to shift the burden of a known loss from the defendant's shoulders, it was not completed till all that was done by Dimick to effect that object had been accomplished.

Whether the various entries testified to by the witnesses whose former perjury was conceded did or did not corroborate their evidence on this trial is not material on the question of their admissibility. They were offered, not as independent evidence, or received as such, but were a part of the testimony of the witness himself, memoranda made by him at the time, sworn to by himself to have been true statements when made, and minuting a multitude of dates, names, figures, and values, the details of which no witness could be expected to retain in his unaided memory. As such they were admissible in connection with his testimony. *Insurance Co. v. Weides*, 14 Wall. 375. They were not "unproved copies of unproved accounts," as in *Mining Co. v. Fraser*, 130 U. S. 611, 619, 9 Sup. Ct. 665.

To the refusal of the trial judge to strike out evidence as to instructions given by Dimick to deduct certain percentages from premiums, no exception was taken, and it cannot be considered here. The testimony as to the James Wade and the Gleniffer, not included in this action, was offered to show knowledge on the part of defendant's manager in New York of Dimick's practice of protecting de-

fendant by reinsurance when he heard of loss or peril to the property insured. It tended to prove this if supplemented by further proof. Plaintiff failed to so supplement it, and the court expressly charged that no knowledge was proved on the part of the defendant, which is all that was required, (*Pennsylvania Co. v. Roy*, 102 U. S. 451,) certainly, in the absence of a motion to strike out, or to instruct the jury that all evidence as to these two vessels was to be disregarded.

The testimony as to entries touching the Coyne, Jennie Matthews, Potomac, and California, vessels not in this action, was offered to prove dates of reinsurances which were the subject of suit. The dates when reinsurance was effected nowhere appeared, and it was not to be expected that any witness, even if he remembered the fact of reinsurances, could carry all the dates in his unaided memory. It was only by the position of the entries in the books, relatively to other entries where dates were minuted, (such as acceptance of original risk, reports to the companies, etc.,) that the witness who made the entries was able to testify that the effecting of the reinsurance in issue was on, before, or after some calendar date. To an extent sufficient to enable him to fix such date, it was proper for the witness to testify from the entries he had himself made, and we cannot find that the testimony exceeded that limit. If competent to prove the dates, as we are satisfied it was, it was admissible, although it also disclosed other fraudulent reinsurances. *Dutchess Co. v. Harding*, 49 N. Y. 321, 325.

The defendant's protection against inferences from the other frauds, thus incidentally shown, lay in a request to direct the jury to disregard them. But, as we have before shown, it was entitled to no such direction. The evidence was proper for the jury to consider as showing fraudulent acts similar to those which were the subject of complaint, and performed at the same time. The evidence showing the lines of insurance and reinsurance which the defendant had carried during the year in question was relevant and material. Showing, as it did, a general system or course of business, the result of which was that the Continental was found to be re-insured when there was a loss to be paid, and not to be reinsured, however large its risks, when there was none, it was a fact from which, taken in connection with others, it might be fairly inferred that these results were secured, not by the exercise of sound judgment, nor by rare good chance, but by fraudulent practices of the kind testified to by Dimick's accomplices.

The assignment of error based upon the refusal of the trial judge to direct a verdict for the defendant rests upon the proposition that it did not appear by the evidence that the defendant had received the fruits of any of the frauds committed by Dimick upon the plaintiff. It was proved that in each case of

a loss upon a risk insured by the defendant, part of which had been ostensibly reinsured by the plaintiff, Dimick adjusted the loss, and paid it to the assured out of funds of the defendant in his hands, charged the whole amount to the defendant in his account with it, drew a draft on the plaintiff for its proportion as a reinsurer, credited the proceeds of the draft to the defendant in his account, and sent the plaintiff a receipt, signed by him as agent for the defendant, acknowledging payment of the amount received. Whenever a loss was settled he informed the defendant that the transaction was closed, and of its net loss after deducting the reinsurance, by sending to it the "loss pocket;" and in each monthly statement he informed the defendant that out of its funds in his hands he had paid its whole loss by appropriating therefrom only the amount of the net loss.

The moneys thus received and applied by Dimick to pay the defendant's losses were received by the defendant as completely, for all practical purposes, as they would have been if he had transmitted them to the defendant, and the defendant had paid them over to the assured in settlement of the loss. *Pratt v. Foote*, 9 N. Y. 463. The law looks at the substance of the transaction, and is quite unconcerned about its form. The defendant got the benefit of these moneys because they were applied to extinguish its debts to the assured, and because they increased its funds in the hands of its own agent. It is quite immaterial that the moneys were not physically transferred by Dimick to the defendant, or that, after Dimick received them, and had used them to extinguish the debt of the defendant, he subsequently became and remained indebted to the defendant in an amount larger than the aggregate of these moneys. Dimick not only assumed to act in obtaining them as agent for the defendant, but he appropriated them to discharge the debts of the defendant. The case is one for the application of the rule that he who seeks to avail himself of the advantages of the act of another, after knowledge of its fraudulent character, must be held to adopt the fraud, although at the time of the act he was igno-

rant of it. The doctrine is elementary, and prevails at law as well as in equity, that a person, though innocent himself, cannot retain an advantage obtained by the fraud of another, in the absence of some consideration moving from himself.

The assignment of error founded upon the refusal of the judge to direct the jury to find for the defendant as to the cause of action for the loss of the cargo of the *Manistee* proceeds upon the theory that the jury were not authorized to find for the plaintiff upon the uncorroborated testimony of the witness Richard Dimick, who concededly had testified falsely in respect to the same facts upon a previous occasion. There is modern authority to the effect that the question of the credibility of such a witness is entirely one for the jury, when submitted to them under prudential instructions. *Dunn v. People*, 29 N. Y. 523, 529; *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68. But this assignment of error is invalid because of the testimony of the witness Neff, a witness whose credibility was not impeached to the same purport as that of Richard Dimick.

The assignment of error, because the judge refused to direct the jury to find a verdict for the defendant as to the cause of action for the loss of the cargo of the *Nyack*, proceeds upon the ground that there was no evidence that the plaintiff paid any part of the loss. It was not shown that Dimick had drawn any draft on the plaintiff for the amount of its reinsurance upon this loss, or that the plaintiff had remitted the amount to him; but it did appear that he charged it with the amount, and credited the defendant with a like amount in his cash book. As Dimick was the common agent of both parties, this was sufficient *prima facie* evidence that he had paid the reinsurance for the plaintiff. If he had paid it, the case was as though the plaintiff had paid it. Unless he or the plaintiff had paid it, the defendant would not have been entitled to be credited, as it was, for the amount. The assignments of error thus considered are the only ones which seem to require discussion.

The judgment is affirmed.

WALLACE v. KENNELLY.

(47 N. J. Law, 242.)

Supreme Court of New Jersey. June Term, 1885.

Certiorari to court of common pleas, Hudson county.

Action by James Wallace against John Kennelly for two months' rent for October and November, 1883, at \$35 a month, under a lease for the term of two years and ten months from July 1, 1883. By assignment defendant transferred the lease to Joseph Kennelly. Judgment for defendant.

Argued February term, 1885, before DEPUE, VAN SYCKEL, and SCUDDER, JJ.

W. B. Gilmore, for plaintiff. J. Flemming, for defendant.

SCUDDER, J. By section 174 of the district court act (Revision, p. 1330), from the order, determination, or decision of the court of common pleas an appeal may be removed into this court by writ of certiorari, and the writ shall remove said order or determination and the case agreed upon or settled as therein mentioned. What the state of the case must contain is indicated in *Benedict v. Howell*, 39 N. J. Law, 221. In brief, it must contain only enough of the facts to enable the court on appeal to determine the legality of the rulings in the court below. By section 170 of the act the determination of the judge (or in cases where there is a jury, the verdict of a jury and any judgment thereupon), shall be final and conclusive between the parties upon questions of fact, except as therein provided. The facts most favorable to the plaintiff's or defendant's case, which are essential to support the judgment, shall be taken as found, and will not be weighed in this court against opposing evidence. Here the facts as shown by the state of the case must, after verdict, be most liberally construed in favor of the defendant.

The first objection urged is that the district judge, instead of deciding on the evidence that, as there was no surrender in writing of the lease signed by the lessor, or by act and operation of law, under the statute of frauds, permitted the evidence to go to the jury, and charged: "That if a tenant and landlord verbally agree that the lease shall end, and the leased premises are by such agreement given up by the tenant, and his possession of them ends, and the landlord agrees with and accepts another person as his tenant, who, as such tenant, occupies the premises, and pays the rents to the landlord, this will, in law, operate as a surrender by the first tenant."

The judge also charged: "That if the landlord or the agent assented to an assignment and agreed that the lease should be assigned by John Kennelly to Joseph Kennelly, and if it was actually assigned in writing, pursuant to such assent, the assignment

would not be an ending of the lease or term."

The substance of the charge in the words used by the court was, as I understand it, that an assignment of the lease with the verbal consent of the landlord, and the subsequent acceptance of rent by him, would not be a surrender of the lease in writing or by act and operation of law, but that other facts in the case, if found by the jury, might effect a surrender by act and operation of law.

On demurrer to a plea in *Hunt v. Gardner*, 39 N. J. Law, 530, it was held that where the facts set out in the plea are that the lessee assigned away his interest in the lease, and that the lessor received the rent from the assignee, and accepted him as his tenant under the lease, these constitute no bar to an action of covenant for rent on the lease against the original tenant.

The utmost effect of these averments is that the privity of estate is ended, but not the privity of contract. There must be the further averment that such assignee was substituted in the place of the original lessee, with the intent on the part of the parties to the demise to annul its obligations. If this be established by competent proof, in writing or by parol, then there are no more contract relations between the parties remaining upon which either an action of covenant or debt can be maintained. See cases collected in notes, *Woodf. Landl. & Ten.* 496. Here there is evidence that there was an oral agreement between the lessor, James Wallace, and John Kennelly, the lessee; that by it not only was there a consent to the assignment of the lease by John to Joseph Kennelly, but it was also agreed that a lease should be drawn and executed by the lessor to Joseph, and that he should be substituted as tenant, and that, although no lease was drawn, Joseph was in fact substituted for John, and thereupon took possession of the premises, and paid rent for two successive months thereafter, which was accepted by the landlord, and receipts given to him as tenant. These facts, if believed by the jury, are a sufficient surrender to determine the former tenancy. *Woodf. Landl. & Ten.* § 498; *Nickells v. Atherstone*, 10 Q. B. 944; *Murray v. Shave*, 2 Duer, 182; *Randall v. Rich*, 11 Mass. 494; *Dodd v. Acklom*, 6 Man. & G. 672; *Grimman v. Legge*, 8 Barn. & C. 324. A fact corroborative of such substituted tenancy is found in the second receipt given by the landlord, James Wallace, dated September 1, 1883, for rent up to October 1st. The last sentence in this receipt reads, "Let for one month only." This is not according to the term in the lease to John Kennelly, but the receipt, being given to Joseph Kennelly for rent paid by him, must indicate that the term of his tenancy was monthly, and under a new letting to him.

There was no error in leaving this question to the jury on the disputed question of facts,

and the defendant's testimony, if believed, was sufficient to establish a surrender by operation of law. The effect of such subsequent letting, as stated by Lord Denman in *Nickells v. Atherstone*, is: "As far as the plaintiff, the landlord, is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the defendant's term."

The other reason assigned is that the judge admitted illegal evidence in defense of the action. There was a clause in the lease that "this lease is upon condition that no ales or porter shall be sold by the tenant on said premises excepting that manufactured and bought from the landlord, James Wallace." This was a condition subsequent, and the breach of it would not defeat the lease. A breach might subject the lessee to damages. The judge admitted this evidence, and said he would control it afterwards. It was clearly irrelevant to show that the landlord delivered bad ale, which, on notice, he took back, and sent other ale, which was no better. If the ale was unfit for use, the tenant might defend for that cause, if sued for not taking it, or if he bought from others, and sold it on the premises. For such cause it might be a defense in an action for breach of the covenant, but it was no defense to the landlord's action for rent. If admitted, therefore, as matter of direct defense, the error would not be cured by a subsequent charge directing the jury to disregard it.

But there is a view in which this testimony is relevant and admissible. There was a dispute about the quality of the ale between the landlord and tenant. The defendant testifies: "I notified the plaintiff the ale was bad, and told him to send for it. He sent for it, and took it back, and said he would send a sample package. He did so, and what

he then sent went flat. I could not sell any of the ale. No one would drink it about there. I told plaintiff the place would not pay, and I would give up the lease. That the ale would not sell there. Plaintiff asked me if I had anybody to take the place. I told him, 'yes,' and asked him if he was satisfied to do so." He says he sent over his brother, and the arrangement was made with him as above stated. *Stephen's Digest of the Law of Evidence* (part 1, c. 2, art. 8) says: "Facts necessary to be known to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, etc., are relevant in so far as they are necessary for these purposes respectively." The dealings of these parties in the ale being the cause of complaint, and wish to be released from the lease on one side, and the motive for the alleged consent and willingness of the other to the substitution of another tenant, brings the evidence within the rule above stated. It tends to show how the parties came together, and why they acted as it is claimed they did, for it appears to be the immediate and only cause assigned for the change in the tenancy, and ending the privity of contract, which is the fact in issue. The judge said to the jury, in his charge: "The delivery of bad ale, or ale that spoiled, would not in this case end the lease, or be a defense. What the facts are as to the quality of any ale the plaintiff furnished to defendant, you are to use only to throw light upon or help you to conclude what the parties said in New York, and agreed upon at the interview between them about the premises." There was no error in admitting the evidence and limiting it to the purpose for which it was alone relevant to the issue.

The judgment will be affirmed.

BELL et al. v. BREWSTER et al.

(10 N. E. 679, 44 Ohio St. 690.)

Supreme Court of Ohio. March 1, 1887.

Error to district court, Union county.

The original action was a suit by the plaintiffs below to quiet their title to certain lands situated in Union county, and which they claimed as the heirs at law of the person last seized. He died in that county on September 11, 1873, and was then known by the name of Robson L. Broome. The plaintiffs, however, claimed that his right name was Levi Brewster; that he was a son of Seabury Brewster, late of Norwich, Connecticut; that he intermarried with Lucy Waterman on March 13, 1820, by whom he had two sons, Richard Brewster, a plaintiff, and Sherman Brewster, deceased, whose widow and children were the other plaintiffs; that he afterwards abandoned his family, assumed the name of Robson L. Broome, removed to Union county, and there resided to the time of his death, and was possessed of a large amount of real and personal property, the subject of controversy. A number of rival claims were set up to that of the plaintiffs,—in one that his right name was Elisha Case; and in another that it was George Washington Broome; and the heirs of these persons were made parties defendant. An appeal was taken from the judgment of the common pleas court to the district court of the county, where judgment was rendered in favor of the plaintiffs below.

W. B. Loomis and C. H. Grosvenor, for plaintiffs in error. J. W. Robinson, for defendants in error.

MINSHALL, J. The principal issue of fact in the case was whether Levi Brewster, the ancestor of the plaintiffs, was the same person who was known in Union county by the name of Robson L. Broome, and died possessed of the property in controversy. As tending to support the issue on their part, the plaintiffs introduced (1) a letter purporting to have been written by Levi Brewster in the year 1810, from an academy in Connecticut, addressed to Elisha Brewster as his brother. No other evidence was introduced that it had been so written than that it had been obtained from the family papers of Elisha Brewster, then deceased, who was the brother of Levi. Also (2) a pay-roll of Company 7, Regiment 20, in the war of 1812, on which one Levi Brewster appears as receiving for pay as a private in said company, with evidence tending to show that he had been a private in the same; but no evidence was introduced to show that he in fact signed the roll, other than that it was produced from the archives of the government in the war department at Washington city. As standards of comparison, they also introduced (3) certain books and writings, admitted or duly proven to be in the genuine hand-

writing of the decedent, written by him while living at Marysville, in Union county, under the name of Robson L. Broome. Experts were then called, who, upon a comparison of the writings, testified that in their opinions the letter and the signature to the pay-roll were in the same handwriting as were the books and writings that had been introduced as standards of comparison.

Two objections are made to the admissibility of this evidence: (1) That it is not shown that the letter was written, nor that the pay-roll was signed, by the Levi Brewster whom the plaintiffs claim to have been their ancestor; (2) that proof of handwriting by comparison of hands is not competent for the purpose of proving the identity of a person.

1. We do not understand, from the bill of exceptions, that there was any serious controversy in the case as to the name of the ancestor of the plaintiffs, or as to who were his relatives. These facts, we may assume, were reduced to reasonable, if not absolute, certainty; so that this objection must be understood as applying to the introduction of the letter and pay-roll for comparison with the admitted writings of Broome, without other evidence that the letter had been written, or the pay-roll signed, by Levi Brewster, the ancestor of the plaintiffs, than as before stated. It is true there was no direct evidence as to who wrote the letter, or as to who signed the pay-roll. The letter was written in 1810, and the pay-roll was signed in 1814. It would have been difficult, if not impossible, to show the fact by direct testimony, after such a lapse of time. But more or less credit has always been attached to ancient documents, without other proof of their authenticity than that of their production from proper depositories. Where any document purporting or proved to be 30 years old is produced from its proper custody, it is presumed that the signature, and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting. Steph. Dig. Ev. 156; Whart. Ev. § 194 et seq.; Id. § 702.

This exception to the general rules of evidence rests upon a conceded necessity (Tayl. Ev. § 1874), and applies, not only to such instruments as are of a formal character, such as wills, bonds, and other deeds, but also to receipts, letters, entries, and all other ancient writings. 2 Phil. Ev. (10th Eng. and 4th Am. Ed.) 481.

Thus, in *Bere v. Ward*, on the trial of an issue as to the legitimacy of a particular person, a very old letter, purporting to bear the signature of the head of the family, and brought from among the title deeds kept at the family seat, was admitted as genuine, without further proof of handwriting, by Dallas, C. J., and also by Lord Tenterden on a second trial. 2 Phil. Ev., supra, note 4.

This ruling was followed in *Doe v. Beynon*, 12 Adol. & E. 431, where certain old letters were admitted in evidence upon the issue in the case whether the person claiming as devisee of the writer was the person intended. They were admitted without proof of handwriting, or other proof of their genuineness than that they found among the papers of the person to whom they had been addressed at the time of her death.

In *Bertie v. Beaumont*, 2 Price, 308, an old receipt, produced by the defendant, was admitted as evidence tending to prove a modus, without proof of handwriting. There was some question made as to the custody of it having been given to a person other than the one who produced it. Upon this the chief baron observed: "It was not given to this Mr. Beaumont, but to another person of the same name, and who, of course, occupied lands in Buckland, for none but an occupier could have acquired such a receipt. That person being of the same name with the present defendant, there is a reasonable inference that they were so connected as to make this the proper custody; and reasonable evidence of proper custody is all that can be required, and is sufficient."

In *Fenwick v. Reed*, 6 Madd. 7, it was ruled "that a letter, appearing upon the face of it to be written by the defendant's attorney, upon the subject of the suit, and coming out of the custody of the representative of his attorney, and dated in 1748, was admissible without proof of handwriting; the contents of a letter, like the contents of a deed, affording intrinsic evidence in its favor." The case was determined in 1821. And in *Wynne v. Tyrwhitt*, 4 Barn. & Ald. 376, it was said by the court: "The rule is not confined to deeds or wills, but extends to letters and other written documents coming from the proper custody. It is founded on the antiquity of the instrument, and the great difficulty, nay, impossibility, of proving the handwriting of a party after such lapse of time."

It is true that the admission of written instruments, without other proof of their genuineness than that which arises from their age and custody, opens the door to error and fraud; but this is no more so when they are introduced for the purpose of establishing the identity of a person by a comparison of hands than when introduced for any other purpose. In commenting on the possibility of error and fraud attending the admission of ancient documents as evidence, Prof. Wharton says: "No doubt, ancient documents, as well as modern, may be forged." To this he makes two replies: "In the first place, while documents attested by witnesses, since deceased, have been forged, the fact that there is a possibility of such falsification is an objection to credibility, but not to competency. In the second place, by requiring that the document should be taken from the proper depository, the probability of falsification is

greatly diminished." 1 Whart. Ev. § 194. This has been regarded as an adequate ground for the admission of such documents in evidence, without further proof of their authenticity, by most writers on evidence. 2 Phil. Ev. (10th Eng. and 4th Am. Ed.) 480.

No evidence is entirely free from infirmities of some kind. An honest witness may err in his recollection in what he has seen or heard, or his own senses may have been deceived in what passed under his observation, or, on the other hand, the witness may be dishonest, and not tell the truth. But the possibility of error is not a ground for the rejection of evidence in any case. It goes to its weight, and is to be considered by the jury or the court trying the case.

2. It is a well-settled rule in this state that, where the genuineness of handwriting is involved, well-attested standards of the hand of the person whose writing is in question may be introduced for the purpose of comparison with that which is disputed; and that this comparison may be made, not only by persons who have seen the party write, or have acquired a knowledge of his hand by corresponding or transacting business with him, but also by persons skilled in handwriting, such as are usually called "experts." *Bragg v. Colwell*, 19 Ohio St. 407; *Pavey v. Pavey*, 30 Ohio St. 600; *Calkins v. State*, 14 Ohio St. 222.

While this is not controverted, it is argued that the letter and pay-roll should not have been admitted for the purpose of comparison with the admitted writings of Broome upon any evidence less certain than that required in the case of standards. This is illogical. The fallacy consists in assuming that the letter and pay-roll are the standards, or else that the writing in dispute shall be ascertained with as much certainty as that with which it is compared before the comparison is made. But neither assumption is true. The matter to be determined by comparison of hands was whether the deceased, Broome, had written the letter or not, and so as to the pay-roll; and to require the same certainty as to who wrote the letter or signed the pay-roll as is required as to the standards of the party's hand in question would in no way aid the inquiry, as neither could, under such a rule, be introduced until such conditions had been complied with as would render the introduction of either wholly unnecessary. This is inconsistent with the principle upon which such evidence is introduced, which is to determine the authorship of that which is unknown and disputed by a comparison with that which is known and undisputed. Here the known factors in the case, as presented by the bill of exceptions, were the writings of the deceased, Broome, introduced as standards. Whether he had written the letter or signed the pay-roll was a fact to be proved; and a comparison of hands would tend, at least, to solve the question.

and might reduce it to reasonable certainty; for it is self-evident that proof that two writings are in the same hand is evidence that they were written by the same person.

The uncertainty that may have arisen upon a mere comparison of hands, as to whether Broome wrote the letter or signed the pay-roll, is not, on the competency of the evidence, to be confused with the uncertainty there may have existed as to whether the one had been written and the other signed by the ancestor of the plaintiffs. It is true that, on a question of proof,—that is to say, the weight of evidence,—the one is connected with and depends upon the other; but on a question of competency each is independent and separate. The admissibility of the letter and pay-roll rest upon their antiquity, and the custody from which each was produced; the comparison of hands, upon the evidence which is in general attached to such evidence. We are not now considering the weight of the evidence. The only question presented by the record is the admissibility of that which was received and objected to, as shown by the bill of exceptions.

The spirit of the law of evidence permits a resort to every reasonable source of information upon a disputed question of fact arising in a case. Unless excluded by some positive exception, everything relative to the issue is regarded as admissible; and this is extended to every hypothesis pertinent to the issue. 1 Whart. Ev. § 20. Here the hypothesis proposed by the plaintiffs below was that the letter written from the academy by a Levi Brewster, and the signature of a person of the same name to the pay-roll, were in the same handwriting as were the writings introduced as standards, and admitted to be in that of the decedent. The pertinency of this hypothesis is apparent. If the fact were established, it would only remain to the plaintiffs, in order to make out their case, to show that the Levi Brewster who wrote the letter or signed the pay-roll was their ancestor. Hence, upon principle, the competency of the evidence seems very plain.

But it is argued that no instance of a case can be produced where a comparison of hands was resorted to for the purpose of proving the identity of a person, except in what is claimed to be a very questionable one,—the Tichborne Case. In the first place, the case just referred to is not regarded as one of questionable authority by writers on the law of evidence. 1 Whart. Ev. § 9 et seq. In the next place, many instances may be produced, other than that of *Queen v. Cator*, 4 Esp. 117, in which a comparison of hands has been resorted to for this purpose. In *Com. v. Webster*, 5 Cush. 295, such evidence was introduced for the purpose of showing that certain anonymous letters, written in a disguised hand, addressed to the city marshal of Boston, between the disappearance of the deceased and the arrest of the de-

fendant, containing various suggestions calculated to mislead the officers of the law, had been written by the defendant. The object was to incriminate the accused by identifying him with the person who wrote the anonymous letters. Such evidence has been received as competent for the purpose of identifying the defendant in prosecutions for sending threatening letters, and in arson; also, for a like purpose, in suits for libel. *Com. v. Webster*, supra, 301; 2 Greenl. Ev. § 416. Among the various circumstances relied on as tending to show that Sir Phillip Francis was the author of Junius, were, as enumerated by Prof. Wharton, that his handwriting had certain marked peculiarities. 1 Whart. Ev. § 23. This, however, could only be determined by a comparison instituted between the writings of the supposed, and the manuscript of the real, author.

Again it is resorted to in a large class of cases where there is a question as to whether the party sued is the person who signed the instrument on which suit is brought. 1 Greenl. Ev. § 575. In all such cases, it will be observed, the question is not as to the genuineness of the paper, but as to the identity of the party sued with the person who signed and is liable upon it. The object of offering such evidence may arise in a variety of forms. A writing may be in a disguised hand, as in the *Webster Case*, 5 Cush. 295; or it may have been intended as an imitation of that of some third person, as in the case of a forgery; or it may be neither disguised nor imitated, as is assumed in this case. Now, it is evident that in either of the first two instances the liability to error in forming an opinion, even by experts, will be greater than in the last one; because in both of the first two instances the writing is executed for the express purpose of deceiving, while in the latter there has been neither dissimulation nor forgery, and one specimen of genuine writing is simply compared with another; so that, on principle, there is less room for questioning the propriety of a resort to a comparison of hands in the latter than in either of the two former instances.

The value of such evidence on a question of personal identity is strikingly illustrated in the case above referred to as that of *Tichborne*. A comparison of the writings introduced in the case would convince any intelligent person that there was no truth whatever in the claim of the defendant. It disproves his identity with the real Sir Robert Tichborne. What was true in that case must be true, to a greater or less extent, in every instance where a case of personal identity is involved. Judicial proof is not a matter of mere arbitrary rules. Its principles are drawn from the experience and observation of men, and should be applied as they are by men in general. Every lawyer and judge of experience will confirm what is said by Mr. Phillips in his work on Evidence: "It may

be laid down as a first principle that exclusion is generally an evil, and admission generally safe and wise;" to which he adds: "It is certain the administration of justice in our courts has suffered, not from too free admission of evidence, but from too rigid exclusion." 2 Phil. Ev. (Edward's Ed.) 628.

Judgment **affirmed**.

In re THOMPSON, Commissioner of Public Works.

In re BUTLER.,

(28 N. E. 389, 127 N. Y. 463.)

Court of Appeals of New York, Second Division. Oct. 6, 1891.

Appeal from supreme court, general term, second department.

Application of Hubert O. Thompson, commissioner of public works, etc., to extinguish certain water-rights for the use of the city of New York. The award of commissioners appointed to assess damages was affirmed by the special term, and again by the general term. Claimant, Butler, appeals. Affirmed.

William Allen Butler and Willard Parker Butler, for appellant. *Arthur H. Maston*, for respondent.

PARKER, J. This proceeding was brought pursuant to the powers conferred on the commissioner of public works of the city of New York by chapter 445 of the Laws of 1877, and the various acts amendatory thereof, to acquire the right to divert and keep diverted from the Bronx river all the water of the river north of and above the dam at Kensico. The commissioners awarded to the claimant, who was the owner of a large and valuable farm through which the river ran, damages in the sum of \$7,270. From the order confirming such report and award successive appeals have been taken by the claimant to this court, the latter appeal being especially authorized by the act of 1877. But the fact that an appeal to this court is permitted does not bring up for review a question of fact arising upon conflicting evidence, and this court has no jurisdiction to review the decision of the general term, unless error of law in the proceedings be found. In re Thompson, 121 N. Y. 277, 24 N. E. Rep. 472.¹ That case had its origin in proceedings taken under chapter 490, Laws 1883, but the provision permitting an appeal to the court of appeals is the same as in the act authorizing the proceedings before us, and the decision cited is therefore applicable and controlling. Unless, then, some error of law requires a reversal, the decision of the general term must stand.

The only exception to which our attention is called relates to an effort on the part of the owner to prove what had been paid by the petitioner for water-rights appurtenant to a neighboring parcel on the same river. At folio 7467 the counsel for the owner offered to prove that the city of New York purchased from Robert White the right to divert the waters from one-half of the water-shed of the Bronx river, and paid him the sum of \$21,991.66 for such rights, and his privileges in connec-

tion with a certain mill upon what is known as the "Powder-Mill Property" at Scarsdale. The commission declined to rule on the offer, at the same time, by its chairman, saying, in effect, that a ruling would be made as the evidence should be presented. In that connection no other evidence was offered, and the exception then taken is, of course, not available. But, in view of the stipulation making the evidence as to all parcels applicable to any other, it is claimed that this appellant is entitled to the benefit of any exception taken to the rejection of evidence bearing on the question of the value of his water-power. We shall assume, without deciding, that this claim is well founded. Robert White was vested in fee with the riparian ownership in such premises at the time of the commencement of the proceedings to acquire title by the city. Pending the proceedings he died. Subsequently, pursuant to an agreement with his heirs, a conveyance was made to the city. Respecting the manner in which the proof was sought to be made, the owner offered in evidence the deed, which expressed a consideration. But, for the purpose of proving the price paid, it was not competent. Mayor, etc., v. McCarthy, 102 N. Y. 630, 8 N. E. Rep. 85. One or more witnesses were asked to state the sum paid, and, as the objection went solely to the competency of the evidence for any purpose, it must be assumed that the witnesses were competent to answer the question. And the question, then, is, was the rejection of the evidence as to the amount paid by the city for the White water-power error for which a reversal should be had?

This question has been presented to the courts of last resort in several of the states, but not with the same result. In Massachusetts, New Hampshire, Illinois, Iowa, and Wisconsin it is held that actual sales of other similar land in the vicinity, made near the time at which the value of the land taken is to be determined, are admissible as evidence for the purpose of arriving at the amount of compensation. Gardner v. Brookline, 127 Mass. 358; Packing, etc., Co. v. City of Chicago, 111 Ill. 651; Town of Cherokee v. Land Co., 52 Iowa, 279, 3 N. W. Rep. 42; Railroad Co. v. Greely, 23 N. H. 242; Washburn v. Railroad Co., 59 Wis. 364, 18 N. W. Rep. 328. While in some of the other jurisdictions, notably Pennsylvania, New Jersey, Georgia, and California, it is held that sales of similar property are not admissible for the purpose of proving the value of property about to be taken. Railroad Co. v. Hjester, 40 Pa. St. 53; Railroad, etc., Co. v. Bunnell, 81 Pa. St. 414; Railroad Co. v. Ziemer, 124 Pa. St. 560, 17 Atl. Rep. 187; Railroad Co. v. Benson, 36 N. J. Law, 557; Railroad Co. v. Pearson, 35 Cal. 247-262; Railroad Co. v. Keith, 53 Ga. 178. The reasons assigned for the conclusion reached in the cases last cited are, in the main, that the test in legal proceedings is, what is the present market value of the property which is the subject of controversy? It may be shown by the testimony of competent witnesses, and on cross-examination, for the purpose of testing their knowledge respecting the market value of land in that vicinity, they may be asked to name such sales of property, and

¹ This case was decided under the authority of Code Civil Proc. N. Y. § 1337, which provides that a question of fact arising upon conflicting evidence cannot be determined upon an appeal to the court of appeals from a final judgment, or from an order granting or refusing a new trial, unless where special provision for the determination thereof is made by law.

the prices paid therefor, as have come to their attention. But a party may not establish the value of his land by showing what was paid for another parcel similarly situated, because it operates to give to the agreement of the grantor and grantee the effect of evidence by them that the consideration for the conveyance was the market value, without giving to the opposite party the benefit of cross-examination to show that one or both were mistaken. If some evidence of value, then *prima facie* a case may be made out, so far as the question of damages is concerned, by proof of a single sale, and thus the agreement of the parties which may have been the result of necessity or caprice would be evidence of the market value of land similarly situated, and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show—*First*, the dissimilarity of the two parcels of land; and, *second*, the circumstances surrounding the parties which induced the conveyance,—such as a sale by one in danger of insolvency, in order to realize money to support his business, or a sale in any other emergency which forbids a grantor to wait a reasonable time for the public to be informed of the fact that his property is in the market; or, on the other hand, that the price paid was excessive, and occasioned by the fact that the grantee was not a resident of the locality, nor acquainted with real values, and was thus readily induced to pay a sum far exceeding the market value. Thus each transaction in real estate claimed to be similarly situated might present two side issues, which could be made the subject of as vigorous contention as the main issue, and, if the transactions were numerous, it would result in unduly prolonging the trial, and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult.

Our attention has not been called to a case in this court where the question has been passed upon in the manner here presented, but there are a number of decisions indicating the tendency of the court to be against proving value by evidence of the selling price of similar property. In *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. Rep. 544, the defendants attempted to prove the value of certain sea-side property by showing the value of other property of the same general character situated in different places, and Judge BRADLEY, speaking for the court, said: "It may be that such evidence would have furnished some guide for estimate of the value of the property, but might not. Such evidence would present collateral issues, which might, and very likely would, involve a variety of considerations having relation to similarity or difference, and to advantages and disadvantages of the different properties in numerous respects, as compared with that in question. It is quite well settled that evidence of that character is not admissible upon the question of the value of property in controversy." The question was not necessarily before the court in *Mayor, etc., v. McCarthy*, 102 N. Y. 630-638, 8 N. E. Rep. 85; but Chief Justice RUGER, referring to the question whether

the price paid on sales of real estate between individuals is admissible as evidence of value, said: "We think it quite clear, however, that such price is not, in any view, competent evidence of value." In *Blanchard v. Steam-Boat Co.*, 59 N. Y. 292, the defendant attempted to show the value of a sunken steam-boat by proving the value of other steam-boats with which she could be compared, and it was held that the evidence was not competent. In *Langdon v. City of New York*, (Sup. Ct.) 13 N. Y. Supp. 864, the objection was that other evidence should be produced to establish the fact sought to be proven, (page 866,) so that the question of the relevancy of the evidence was not before the court. We are of the opinion that the value of property which depends upon the presence or absence of inherent qualities not necessarily present or absent in other and similar property cannot be proved by showing the price paid for such other and similar property. The value of property having a recognized market value, such as No. 1 wheat and corn, may, of course, be proven by showing the market prices; but the value of property which is dependent upon locality, adaptability for a particular use, as well as the use made of property immediately adjoining, may not be shown by evidence of the price paid for similar property. Even under the Massachusetts rule, a reversal would not be justified because of the extent of the discretion vested in the judge or officer presiding at the trial to determine whether such evidence is admissible, depending, of course, on various elements, such as the nearness or remoteness of the time of sale; whether the premises are far separated; the condition of the property about the parcel sold, and the use made of it, which may have operated to enhance or diminish its selling value; the similarity of the property, not only as to description, but as to its availability for use. *Chandler v. Jamaica Pond Aqueduct Corp.*, 122 Mass. 305; *Gardner v. Brookline*, 127 Mass. 358-363, and cases cited.

In point of time, the White sale was a year and one-half prior to the date when the offer was made to prove it. The White water-power was in actual use in the operation of a mill, while the water-power of Mr. Butler had not been utilized in any degree whatever. True, as much water will be diverted from the Butler property as the White property, but it does not follow that the respective water-powers are of equal value. The value of a water-power depends on its availability for use; and, as a matter of common observation, that at certain points along a stream the water-power can be more readily and cheaply made available for industrial purposes than at others. So, if appellant's contention as to the admissibility of evidence of that character could be allowed, we should necessarily reach the conclusion that the nature of the evidence offered as to similarity was not of such a character as to authorize a court to hold, as a matter of law, that the commission improperly exercised their discretion in refusing to admit proof of the price paid for the White parcel.

The appellant asserts that the commis-

sion refused to award damages for the injury to the claimant's water-power, and insists that in so doing they committed an error in principle which may be reviewed in this court. After a thorough examination of the record, and a careful consideration of the argument in behalf of appellant, the conclusion is reached that this court is not warranted in determining that an award was not made for such damages as, in the judgment of the commission, the claimant will sustain because of injury to his water-power. The claimant owned about 358 acres of land, covering 4,238 feet on the east bank of the Bronx river, and about 4,636 feet upon the west bank; and for the reduction in the volume of water which naturally flows over this course, occasioned by the diversion on the part of the city, the commission awarded to him \$7,270. This award was made in gross, no items being given, and it is therefore impossible to determine what portion of it was allowed for injury to the tract because of the lessening of the flow of the stream, or what part of it was an award for damages to the water-power. Neither in the report nor in the conduct of the trial is there any indication that it was determined that the water-power was of no value. On the contrary, the commission received a large amount of expert testimony offered by the claimant, tending to show that the water-

power was of considerable value. No evidence in that direction was rejected, save that which tended to prove the price paid by the city for the White water-power; and it should be assumed that they gave to this evidence such weight as it was entitled to. Claimant's experts, it is true, testified that the water-power alone was of far greater value than the entire amount of the award, but, on the other hand, the evidence on the part of the city tended to show that it had little or no value. In making their appraisal they were not required to adopt the estimate of claimant's experts, but were manifestly called upon to base their award upon all the information obtained, "not only from the evidence produced before them, but from their view of the real estate." In *re Thompson*, 121 N. Y. 277, 24 N. E. Rep. 472. This we are bound to assume, in the light afforded by the record, was done. Our attention is called to the expressions of opinion, both at special and general term, to the effect that the water-power has no apparent value. But it does not follow that such was the determination of the commissioners; nor can it be assumed, because of the opinion of the judges sitting in review, that the commission entertained the same view. There are no other questions requiring consideration. The order should be affirmed.

All concur.

COLUMBIA & P. S. R. CO. v. HAWTHORNE.

(12 Sup. Ct. 591, 144 U. S. 202.)

Supreme Court of the United States. April 4, 1892.

In error to the supreme court of the territory of Washington.

Action by Willard C. Hawthorne against the Columbia & Puget Sound Railroad Company for damages for a personal injury. Verdict and judgment for plaintiff, which was affirmed in the supreme court of the territory. Defendant brings error. Reversed.

Statement by Mr. Justice GRAY:

This was an action brought in a district court of the territory of Washington against a corporation owning a saw-mill, by a man employed in operating a machine therein, called a "trimmer," to recover damages for the defendant's negligence in providing an unsafe and defective machine, whereby one of the pulleys, over which ran the belt transmitting power to the saw, fell upon and injured the plaintiff. The defendant denied any negligence on its part, and averred negligence on the part of the plaintiff.

At the trial, the plaintiff introduced evidence tending to show that the pulley, weighing about 50 pounds, revolved around a stationary shaft made of gas-pipe, with nothing to hold the pulley on but a common cap or nut screwed on the end of the pipe, and its thread running in the same way as the pulley, and liable to be unscrewed by the working of the pulley; that the nut became unscrewed, and came off, so that the pulley fell upon and greatly injured the plaintiff; and that if the nut had been properly put on, with a bolt through the shaft, the accident could not have happened.

The plaintiff's counsel asked a witness whether there had been any change in the machinery since the accident. Thereupon the following colloquy took place:

Defendant's counsel: "We object to that. The rule is well understood, and as your honor has already given it in other cases, that a person is not bound to furnish the best known machinery, but to furnish machinery reasonably safe. It is not a question as to what we have done with the machinery in the last few years or months since the accident occurred, but what was the condition then."

The Court: "The rule is quite well settled, I think, that where an accident occurs through defective machinery or defective fixtures or the machine itself, if that is shown to be true, then a change, repair, or substitution of something else for the defective machinery is admissible as showing or tending to show the fact. I think that is quite well settled."

Defendant's counsel: "I thoroughly concur with the court as to the rule."

Plaintiff's counsel: "We propose to show changes."

The Court: "I think it is admissible."

Defendant's counsel: "We will save an exception."

The Court: "Exception allowed."

The witness then answered that there had been changes since the accident, and that they consisted in putting a rod through the shaft, and gammon nuts on the end of the rod to keep the pulleys on, and in putting up some planks underneath the pulleys to keep them from falling down. To the admission of the evidence of each of these changes an exception was taken by the defendant and allowed by the judge.

At the close of all the evidence for the plaintiff (which it is unnecessary to state) the defendant moved "for a judgment of nonsuit, on the ground that the plaintiff had failed to prove a sufficient cause for the jury;" and an exception to the overruling of this motion was taken by the defendant and allowed by the court.

The defendant then introduced evidence, and the case was argued by counsel, and submitted by the court to the jury, who returned a verdict of \$10,000 for the plaintiff, upon which judgment was rendered. The defendant appealed to the supreme court of the territory, which affirmed the judgment. 3 Wash. T. 353, 19 Pac. 25. The defendant sued out this writ of error.

A. H. Holmes, for plaintiff in error. John B. Allen, for defendant in error.

Mr. Justice GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this court. It has repeatedly been decided that a request for a ruling that upon the evidence introduced the plaintiff is not entitled to recover cannot be made by the defendant as a matter of right, unless at the close of the whole evidence; and that if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error. *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493; *Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685; *Railroad Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321; *Robertson v. Perkins*, 129 U. S. 233, 9 Sup. Ct. 279.

The only other exception argued is to the admission of evidence of changes in the machinery after the accident.

It was argued for the plaintiff that this exception was not open to the defendant, because it had been waived by his counsel saying, after the first ruling of the court on the subject, "I thoroughly concur with the court as to the rule." Assuming these words to be accurately reported, it is not wholly clear whether they refer to the rule as to evidence of subsequent changes, or to the rule, men-

tioned just before, as to the degree of care required of the defendant. That they were not understood, either by the counsel or by the court, as waiving the objection to evidence of subsequent changes, is shown by the plaintiff's counsel thereupon saying, "We propose to show changes," and by the court ruling them to be admissible, and allowing an exception to this ruling, and immediately afterwards allowing two other exceptions to evidence on the same subject. And the question of the admissibility of this testimony was considered and decided by the supreme court of the territory. 3 Wash. T. 353, 364, 19 Pac. 25.

This writ of error, therefore, directly presents for the decision of this court the question whether, in an action for injuries caused by a machine alleged to be negligently constructed, a subsequent alteration or repair of the machine by the defendant is competent evidence of negligence in its original construction.

Upon this question there has been some difference of opinion in the courts of the several states; but it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant. *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358; *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309; *Nalley v. Carpet Co.*, 51 Conn. 524; *Ely v. Railway Co.*, 77 Mo. 34; *Railway Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *Railroad Co. v. Clem*, 123 Ind. 15, 23 N. E. 965; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. 123; *Lombard v. Village of East Tawas*, 86 Mich. 14, 48 N. W. 947; *Shinners v. Proprietors*, 154 Mass. 168, 28 N. E. 10.

As was pointed out by the court in the last case, the decision in *Readman v. Conway*, 126 Mass. 374, 377, cited by this plaintiff, has no bearing upon this question, but simply held that in an action for injuries from a defect in a platform, brought against the owners of the land, who defended on the ground that the duty of keeping the platform in repair belonged to their tenants, and not to themselves, the defendants' acts in making general repairs of the platform after the accident "were in the nature of admissions that it was their duty to keep the platform in repair, and were therefore competent."

The only states, so far as we are informed, in which subsequent changes are held to be evidence of prior negligence, are Pennsylvania and Kansas, the decisions in which are supported by no satisfactory reasons. *McKee v. Bidwell*, 74 Pa. St. 218, 225, and cases cited; *Railway Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408.

The true rule and the reasons for it were well expressed in *Morse v. Railway Co.*, above cited, in which Mr. Justice Mitchell, delivering the unanimous opinion of the supreme court of Minnesota, after referring to earlier opinions of the same court the other way, said: "But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employes in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so; and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." 30 Minn. 465, 468.

The same rule appears to be well settled in England. In a case in which it was affirmed by the court of exchequer, Baron Bramwell said: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before." *Hart v. Railway*, 21 Law T. (N. S.) 261, 263.

As the incompetent evidence admitted against the defendant's exception bore upon one of the principal issues on trial, and tended to prejudice the jury against the defendant, and it cannot be known how much the jury were influenced by it, its admission requires that the judgment be reversed, and the case remanded to the supreme court of the state of Washington, with directions to set aside the verdict and to order a new trial.

SOUTHERN KAN. RY. CO. v. ROBBINS.

(23 Pac. 113, 43 Kan. 145.)

Supreme Court of Kansas. Feb. 8, 1890.

Error from district court, Franklin county; A. W. BENSON, Judge.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. *H. P. Welsh and John W. Deford*, for defendant in error.

JOHNSTON, J. On June 30, 1886, John F. Patterson was employed in the service of the Southern Kansas Railway Company, as a passenger conductor. At that time a Sunday-School assembly was in session at Ottawa, and the railway company were running excursion trains from several points in the state to that place. On the morning of the day mentioned Patterson went from Ottawa to Lawrence in charge of a passenger train, where it was loaded with excursionists bound for the assembly at Ottawa. On the return trip he stopped at Baldwin City, where there were a number of people intending to join the excursion to Ottawa, and, being short of passenger cars to accommodate them, the company had placed two cabooses and a box-car, temporarily arranged for passengers, on a side track, and directed Patterson to attach them to the rear of his train, for the use of passengers. There is testimony to the effect that Patterson was directed to place the cars in his train in the same order that they were standing,—first a caboose, then the box-car, and then another caboose; and this was the order in which they were attached to the train. After the train left Baldwin City, Patterson proceeded to collect fares, beginning at the front, and passing towards the rear, of the train. When he had completed taking fares in the first caboose, he passed out of the rear door, and proceeded to climb over the box-car, in an effort to reach the other caboose, in which there were passengers. There were no doors in the ends of the car, nor any platforms on the ends of the same, and the only way to get over the car was to climb up a ladder on the side and near the corner of the car, made of iron rods, called "hand-holds" or "rungs," which were screwed to the side and top of the car. These rods were about a foot apart, and extended out from the side of the car about three inches. While he was in the act of ascending this ladder, the train was running at a rapid rate, and just as it passed over a bridge he in some way fell from the car, and was fatally injured. The witnesses who saw the occurrence state that he had nearly reached the top of the car, when he appeared to grasp with one hand for a rung which should have been upon the top of the car, but probably was not, and at the same time let go his hold upon the top rung on the side of the car with the other hand, when he reeled back, and fell from the train. He was found lying in the angle of two braces of the bridge, his skull fractured, and his left leg broken. He was unconscious when found,

and remained so until his death, which occurred the day of the accident. This action is brought by the representative of the deceased, to recover damages for the benefit of the widow and child, it being alleged that his life was lost in consequence of the negligence of the railway company. The company alleged and contended that Patterson was guilty of negligence contributing to the accident. The plaintiff prevailed, and recovered a judgment for \$5,500.

Errors are assigned here upon the rulings of the court in admitting evidence. The deposition of a witness was received that was not taken in the exact place stated in the notice. The notice named the office of Winslow P. Hyatt, Colorado street, Pasadena, Los Angeles county, Cal., as the place of taking the deposition; but, as he had moved about a block away on another street, the notary met the plaintiff's attorney at that place at the proper time, and adjourned the taking of the deposition to another office, on another street in Pasadena, and there the deposition was continued, completed, sealed up, and properly addressed. In the afternoon of that day, the attorney for the defendant was found, and informed what had been done, and, by consent, the deposition was then opened, and the witness was recalled and cross-examined by defendant's attorney. The court properly refused to suppress the deposition. The taking of a deposition at another place than that stated in the notice, in the absence of the opposing party, is a sufficient objection to the deposition; but the irregularity was cured by the voluntary appearance of the defendant's counsel at the place where the deposition was taken, and his participation in the proceeding. It is important that the deposition should be taken at the place mentioned in the notice; but the notice is only given to furnish the opposing party an opportunity to appear, and therefore the appearance waives a defect in the notice or the irregularity of a change in the place of taking the deposition. None of the objections to the deposition can be sustained.

A witness was asked, and over objection was permitted to state, whether the deceased was a careful and skillful railroad man. This was clearly erroneous. The question whether Patterson exercised due care in this particular instance was an important issue. It was alleged that he was guilty of negligence, and it was contended that the absence of the hand-hold on the top of the car was an obvious danger, and apparent to any one, and that to ascend a perpendicular ladder in the manner in which he did, by letting go his hold of the rung on the side of the car before laying hold of the rung on the top of the car, was negligence. The issue of his want of ordinary care was before the jury, and there was much testimony submitted concerning his conduct at the time of the injury. There were eye-witnesses present who at the trial described the manner in which he ascended the ladder, and the care

which he exercised at the time the accident occurred; and hence there was no necessity nor propriety in admitting the opinion of an expert as to whether he was generally a careful and skillful man. The determination of whether he was exercising due care when he fell from the car does not depend upon the care exercised by him at other times, or whether he was usually careful in the performance of his duties as a railroad man, but does depend upon his conduct at the time of the accident. The witness who gave the testimony was a conductor on the same railroad, had been acquainted with him for a year, and claimed to have the means of knowing as to whether he was a careful railroad man, and his testimony may have had much weight with the jury in determining that the deceased was in the exercise of due care. With the evidence before them as to the care he used at the time, the jury could determine better than any expert whether or not he was negligent; and the fact that he was generally careful would be unavailing if the testimony showed that his negligence in this instance contributed to the injury. Testimony of this character is no more admissible than an offer by the railroad company to show his want of care at the time of the accident by proving that he was negligent at other times, or generally careless. Exceptions are made in some cases where there are no eye-witnesses of the accident, and better evidence cannot be obtained as to whether the injured person exercised due care; but all the authorities hold such testimony to be inadmissible where the testimony of persons who witnessed the accident is available. *Bryant v. Railroad Co.*, 56 Vt. 710; *Dunham v. Rackliff*, 71 Me. 345; *Hays v. Millar*, 77 Pa. St. 238; *Tenney v. Tuttle*, 1 Allen, 185; *McDonald v. Savoy*, 110 Mass. 49; *Chase v. Railroad Co.*, 19 Amer. & Eng. R. Cas. 356; *Morris v. Town of East Haven*, 41 Conn. 252; *Baldwin v. Railroad Co.*, 4 Gray, 333; *Railroad Co. v. Roach*, 64 Ga. 635; *Railroad Co. v. Clark*, 108 Ill. 113; *Elliot v. Railroad Co.*, 41 N. W. Rep. 758; 1 Greenl. Ev. § 84. Neither was the testimony introduced in regard to how railroad men should and do ascend the ladder of a box-car relevant nor competent. The practice followed by others throws no light on the care used by Patterson in this case. It is not claimed that the opinions of experts

are necessary in the case, and to allow testimony as to how others climbed the ladder would be to create collateral issues as to the prudence of their conduct, and to unnecessarily protract the trial. The question of whether Patterson was guilty of such negligence as would preclude a recovery was an issue before the jury, and the practice or usage of others would not tend to prove care on his part, and such testimony should not have been received. *Railroad Co. v. Clark*, supra; *Lawrence v. Hudson*, 12 Heisk. 671; *Railroad Co. v. Moranda*, 108 Ill. 576; *Railway Co. v. Evansich*, 61 Tex. 3; *Bryant v. Railroad Co.*, supra; *Bailey v. Northampton Co.*, 107 Mass. 496; *Koons v. Railroad Co.*, 65 Mo. 592; *Crocker v. Schureman*, 7 Mo. App. 358; *Cleveland v. Steam-Boat Co.*, 5 Hun. 523; *Lawson, Usages & Cust.* 328.

To account for the fail, a witness, who was not present at the time, gave the following testimony: "*Question.* You say you have passed over this road a great many times? *Answer.* I have. *Q.* And over this bridge? *A.* Yes, sir. *Q.* Now, can you state to the jury, under the circumstances which surrounded Mr. Patterson there, whether or not there was any cause why he should have ascended that car with great speed and haste, and, if so, what that cause was? Explain to the jury. *A.* Well, the way that man started in to go up the side of the car, he couldn't see the bridge when he started; and at the speed the train was running, and him climbing up the side of the car, by the time the engine struck the bridge, he would be towards the top, and, when he heard the thundering noise that the engine makes when it strikes a bridge, he hurried to get on top of the car." This testimony was given over the objection of the plaintiff in error. The witness was the conductor of another train, who was far away when Patterson fell from the box-car. He did not know and could not state whether Patterson could see the bridge when he started to ascend the ladder, nor how far he had ascended when the bridge was reached; neither was he competent to state what causes operated on the mind of Patterson that led him to ascend the ladder with great speed and haste. The admission of the incompetent testimony was error, for which the judgment will be reversed, and the cause remanded for a new trial; all the justices concurring.

NORFOLK & W. R. CO. v. HOOVER.

(29 Atl. 994, 79 Md. 253.)

Court of Appeals of Maryland. June 19, 1894.

Appeal from circuit court, Washington county.

Action by William Hoover against the Norfolk & Western Railroad Company for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Hy. Kyd. Douglass, for appellant. M. L. Keedy and W. C. Griffith, for appellee.

McSHERRY, J. This is an action brought to recover damages for personal injuries received by the appellee, an employé of the Norfolk & Western Railroad Company, as the result of alleged negligence on the part of his fellow servant. The verdict and judgment were in his favor, and the company has appealed. In the record there are three bills of exception, upon which the questions to be considered arise. Two of these exceptions were reversed by the appellant, and one by the appellee.

It appears that in May, 1891, an extra train of loaded freight cars was started from Shenandoah, Va., about 11:30 p. m., to run through to Hagerstown, Md. The crew consisted of a conductor, an engineman, a fireman, a flagman, and two brakemen. Hoover, the appellee, was the engineman. As the train proceeded northward, it descended some heavy grades, and the engineman noticed that its speed was not kept under proper control by the brakemen. At Luray the train laid over for an hour, and the engineman requested the brakemen not to let him down the hills so rapidly, as the night was quite foggy. After leaving Luray, they ascended the grade to Vaughn's Summit, turning the point at a speed of about 10 miles an hour. Immediately upon passing the summit the appellee shut off the steam, so that the train might descend by gravity alone, without aid from the engine. When about a train's length over the hill, he discovered that the train was increasing its speed, and he applied the tank brake; but, this producing no effect, he blew for brakes, turned on the driver brakes, and applied sand to the track. This not checking the train, he again blew for brakes, and reversed his engine. He repeated his signals for brakes at least once, and probably twice, afterwards, but they seem not to have been heeded by the brakemen, for the train moved rapidly onward down the grade. The packing blew out of the cylinder, and this caused the train to plunge forward, throwing the appellee back into the tender. At this juncture they were rapidly approaching, and were only some 10 or 12 car lengths distant from, Possum Hollow, which is crossed upon a trestle 75 or 80

feet high. The appellee saw that a collision with another freight train standing, or moving very slowly northward, on the trestle, was imminent and unavoidable, and, to save himself, jumped from his engine, and received the injuries for which he has brought the pending suit. There was evidence offered tending to prove that Huyett, one of the brakemen, had been drinking that night before the accident happened; and, within 30 minutes prior to the collision, his breath gave unmistakable evidence of it. In this state of the proof, a witness was asked whether he knew the general reputation of Huyett and Reese, the two brakemen, for sobriety for one or two years before the accident and following that, and, if so, to state what that reputation was. To this question and the evidence sought to be elicited thereby, the appellant objected, but the court permitted the question to be asked and answered, and this ruling forms the subject of the first exception.

It has been repeatedly held by this court, and is the settled and established doctrine of Maryland, that in actions of this character, where a servant sues his master for injuries resulting from the negligence of a fellow servant, the plaintiff, to succeed, must prove not only that some negligence of the fellow servant caused the injury, but also that the master had himself been guilty of negligence, either in the selection of the negligent fellow servant in the first instance, or in retaining him in his service afterwards. Mere negligence on the part of a fellow servant, though resulting in injury, will not suffice to support the action, because the master does not insure one employé against the carelessness of another; but he owes to each of his servants the duty of using reasonable care and caution in the selection of competent fellow servants, and in the retention in his service of none but those who are. If he does not perform this duty, and an injury is occasioned by the negligence of an incompetent or careless servant, the master is responsible to the injured employé, not for the mere negligent act or omission of the incompetent or careless servant, but for his own negligence in not discharging his own duty towards the injured servant. As this negligence of the master must be proved, it may be proved like any other fact,—either by direct evidence, or by the proof of circumstances from which its existence may, as a conclusion of fact, be fairly and reasonably inferred. That drunkenness on the part of a railroad employé renders him an incompetent servant will scarcely be disputed; nor can it be questioned that a master who knowingly employs such a servant, or who, knowing his habits, retains him in his service, would be guilty of a reckless and wanton breach of duty, not only to the public, but to every employé in his service. There is no evidence in the record, nor has there been a suggestion, that either the conductor, fireman, or flagman of the train

was negligent or incompetent. The negligence which directly caused the accident is attributed solely to the brakemen; and the appellant's negligence, which, as it is claimed, fixes its liability, lies in its employment of, or continuing to retain in its service, these dissipated or intemperate brakemen. But, as we have stated, it was necessary for the plaintiff to show, not only their employment, but that the company had not used due and ordinary care in selecting them. There was no direct evidence adduced to show the absence of such care; but the question excepted to, and the evidence elicited in response to it, were designed to show by indirect or circumstantial evidence that the company had not used the degree of care and caution in the selection of these brakemen that its duty imperatively required it to use. So the question is, can you fix upon the master a failure to use due care in selecting careful servants by showing such notorious or general reputation respecting the servant's unfitness or incompetency as that the master could not, without negligence on his part, have been ignorant of it when he employed the servant? About this there ought to be no difficulty. If the servant's general reputation before employment is so notorious as to unfitness as that it must have been known to the master but for his (the master's) negligence in not informing himself,—if he could have been ignorant of it only because he failed to make investigation,—then it is obvious that he had not used the care and caution which the law demands of him in selecting his employes. Hence "the servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation for unfitness on the master's part is not shown." Wood, Mast. & Serv., § 420. In *Davis v. Railroad Co.*, 20 Mich. 112, Cooley, J., speaking for the court, adopts the case of *Gilman v. Railroad Co.*, 13 Allen, 433, which puts upon the employer the responsibility of negligently employing an unfit person, generally known and reputed to be such, notwithstanding the employer may in fact have been ignorant of such unfitness. Continuing, he said: "The ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative." So, in *Hilts v. Railway*, 55 Mich. 437, 21 N. W. 878, where a track hand was killed by an engine backing rapidly along a switch, and the engineman was drunk, the court said: "When, however, as in this case, it is shown that the accident occurred through the negligent act of the servant, who was in an intoxicated condition, and when it is shown, further, that he was in the habit of drinking intoxicating liquors to excess, and such habit had extended over a period of nine months while in defendant's employ, and no actual knowledge or notice ever reached any supe-

rior officer of the engineer, we think the jury may be justified in concluding from such evidence that the defendant was negligent in failing to learn such habit, and in retaining the engineer in its employment." See, also, *Gilman v. Railroad Co.*, 13 Allen, 433; *Wright v. Railroad Co.*, 25 N. Y. 566; *Railroad Co. v. Sullivan*, 63 Ill. 293; *Chapman v. Railway Co.*, 55 N. Y. 579. The evidence offered and admitted had no relation to specific or isolated acts of negligence. These, unless brought home to the knowledge of the master, would not have been admissible as reflecting on the question of the master's care. *Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338. We think, for the reasons we have given and upon the authorities we have cited, there was no error committed in allowing the question excepted to in the first bill of exceptions to be put and answered.

Under the ruling, quite a number of witnesses testified to Huyett's general reputation for intemperance, extending from a period long anterior to his employment by the appellant, up to and after the accident. One witness, Eyer, gave evidence as to Reese's general reputation. With respect to Huyett, the evidence, if credited by the jury, showed a general reputation, covering many years, uninterruptedly, and of such a notorious character that a jury might well have inferred it was known to the master when Huyett was employed, or else that the master failed to know it only because of neglecting to make proper inquiry. There was consequently evidence legally sufficient to go to the jury upon the subject of the company's negligence; and therefore there was no error in rejecting the appellant's first and fifth prayers, which sought to take the case from the consideration of the jury, nor in rejecting its fourth prayer, which sought to exclude this evidence from the case.

There was error in rejecting the second prayer of the appellant. It asked the court to say to the jury that, if the injury to the plaintiff was caused by the intoxication or negligence of the brakemen, or either of them; that the brakemen were employed by Shull, the train dispatcher, and were sent out by him on the train in question; and, further, that Shull was guilty of negligence in sending out these brakemen, or either of them, on the train,—“yet the jury are further instructed that Shull and the plaintiff were coemployes of the defendant in the sending out of said brakemen, and the defendant is not responsible to the plaintiff for the neglect or want of care of the said Shull, unless they shall further find that there was negligence on the part of the defendant in the employment of Shull; and there is no legally sufficient evidence in the cause from which the jury can so find.” Now, whether Shull was a deputy master, or vice principal, or only a fellow servant of the plaintiff, is a question of law to be determined by the court, if the facts be undisputed or conceded. *Yates v.*

Iron Co., 69 Md. 382, 16 Atl. 280. Shull was a mere dispatcher of trains, with power to employ and discharge flagmen and brakemen, and having general charge of the trainmen of the first division of the road, and the movement of trains thereon. He was employed by the division superintendent, who had the general management of the division. The enginemen and firemen are also under the instructions of the division superintendent. This is all the evidence (and it is entirely undisputed) to show that Shull was a vice principal, and not a fellow servant. In *Wonder's Case*, 32 Md. 418, the general rule was laid down that all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow servants, each taking the risk of the other's negligence. In that case, a brakeman, who was injured while using a defective brake, was held to be a fellow servant with the mechanics in the shops, the inspector of machinery and rolling stock, and the superintendent of the movement of trains. And so in *State v. Malster*, 57 Md. 287, it was held that a superintendent or manager is a fellow servant, within the rule which exonerates the master. In *Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338, the captain of a steam tug owned by the company was held to be a fellow servant of a laborer who was injured in the company's service. This court said in that case: "Nor is the liability of the master enlarged or made different by the fact that the servant who has suffered the injury occupied a grade in the common service inferior to that of the servant whose misconduct caused the injury complained of." And in *Yates v. Iron Co.*, 69 Md. 370, 16 Atl. 280, the authorities were all reviewed, and it was held that the chief manager of the carbon works, who hired and discharged the hands, kept their time, etc., was only a fellow servant of a laborer who was injured while operating the machinery. *Mayor, etc., v. War*, 77 Md. 593, 27 Atl. 85. In the face of these decisions, it is impossible to treat Shull as anything more than a fellow servant. The management of the division upon which he was train dispatcher was not committed to him. He was a subordinate, appointed by the superintendent; and though he had charge of the trainmen and of the movement of trains on his division, and could employ and discharge flagmen and brakemen, it is far from being shown that the master had relinquished all supervision of the work on that division, and intrusted its direction, as well as the procuring of materials and machinery and other instrumentalities necessary for the service, to his judgment and discretion. The engineman and fireman were not employed by him, but by the division superintendent; and, if the grade of his position was superior to that of the engineman, that fact did not make him

a vice principal as respects the latter. They were both engaged in the same common work, employed by the same agent of the common master, and were performing duties pertaining to the same general business; and, unless the whole current of the Maryland decisions is to be reversed, they were fellow servants of the railroad company, upon the evidence now before us. If this be so, then, even if Shull had been negligent in sending out these brakemen, and if that negligence caused the injury sued for, still the plaintiff could not recover, unless the company had not used due care in the selection of Shull, and of this there was not a particle of evidence offered.

The appellant's sixth prayer was properly rejected. There was no necessity to prove that the company had been incorporated. That fact was averred in the declaration, and was not denied by the pleas, and under section 108, art. 75, of the Code, must be taken to be admitted.

This brings us to the prayers presented by the appellee. Under a local law of Washington county (sections 69, 70, art. 22, Code Pub. Local Laws), we are required to consider the rejected prayers of the plaintiff, if he has excepted; and this he has done. By the defendant's exception, the plaintiff's granted prayers and the defendant's rejected prayers are brought before us. By the plaintiff's exception, his rejected prayers, as well as the defendant's granted ones, are presented for review. The court granted the plaintiff's first, seventh, and eighth prayers. We do not understand that the seventh and eighth are seriously questioned. Without discussing them, we need only say they are not open to substantial objection.

The appellee's first prayer, however, ought not to have been granted. It was objected in the argument that there was no evidence to support some of the hypotheses it contained, but as no special exception based upon that objection, and signed and sealed by the judge, appears in the record, we are not at liberty to consider it. *Albert v. State*, 66 Md. 334, 7 Atl. 697. The prayer, after setting forth the facts, proceeds: "Then, if the said injury to the plaintiff was caused by the want of ordinary skill and experience or other unfitness on the part of the other hands, or any of them, in charge of said train, to manage and conduct the same, by reason of the intemperate state or condition of either of them," the plaintiff using due diligence, "the plaintiff is entitled to recover, provided the jury further find from the evidence that the defendant did not use reasonable care in the selection and employment of the brakemen or other hands or employes engaged with the plaintiff in conducting said cars;" that is to say, if the injury resulted from negligence caused by the intemperance of any of the train hands, the defendant would be liable, if it had failed to use due care in the selection of either of the employes on

that train, even though that particular employé, thus carelessly selected, had been guilty of no negligence, and had in no way occasioned the accident. Consequently, if the jury thought the injury was caused by the drunkenness of the brakemen, and that the company had not used due care in the selection of the fireman, the company would be liable, notwithstanding the fact that the fireman had been guilty of no negligence, and had in no way produced or helped to produce the injury. Thus, the negligence of one servant, and the independent negligence of the master in employing some other servant, who had no connection with the accident, established, under this instruction, the plaintiff's right to recover. This is not the law. On the contrary, it is the negligence of a fellow servant, and the additional negligence of the master in employing that servant, whose negligence actually caused the injury, which must concur before a plaintiff can recover in a case of this character. The instruction therefore announced an obviously erroneous proposition, and was calculated to mislead the jury, because there was evidence before them from which they might have inferred that due care had not been used in the selection of the fireman, though there was no evidence from which they could have found that the fireman was responsible for the accident. The instruction should have clearly restricted the negligence of the defendant in selecting the plaintiff's fellow servants to the selection of such of them as by their incompetency, growing out of their intemperance, actually caused the injury.

The appellee's second, third, fourth, and fifth prayers were properly rejected. There was no legally sufficient evidence adduced to support them, or the several hypotheses assumed in them; and, if they had been free from other objections, this one was sufficient to justify the court in refusing to grant them.

There remains the appellant's third prayer, which the court granted, but we think erro-

neously granted. It told the jury, in substance, that unless the brakeman Huyett was drunk at the time of the accident, and his negligence, by reason of such drunkenness, produced or contributed to the accident, the evidence of general reputation as to his intemperance was not relevant, and could not be considered by the jury, "*unless such reputation was brought home to the knowledge of the defendant before the accident;*" and there is no such evidence of such knowledge. Had the prayer omitted the words italicized, it would have been correct, but those words superadded a condition which is manifestly inaccurate. Now, it is obvious that if Huyett was not drunk and was not negligent when the accident happened, and therefore did not cause or contribute to it, the evidence of his general reputation for intemperance was wholly irrelevant, even though that reputation had been brought home to the knowledge of the appellant before the accident, because, if he did not occasion the injury by his negligence, the fact that the master had knowledge of his bad reputation would in no way have made the master liable for an injury not caused by Huyett at all. In other words, the master's knowledge of Huyett's bad reputation had nothing whatever to do with the case if Huyett did not cause or contribute to the accident; and if Huyett did, by his intemperance, cause the accident, then it was immaterial whether the master had knowledge of his bad reputation or not, because, as already stated, the master was negligent in not knowing it. So, in either view of the question, the prayer was wrong, because of the addition of the words indicated.

For the error in granting the appellee's first instruction and the appellant's third, and for the error in rejecting the appellant's second prayer, the judgment must be reversed, and a new trial be ordered. Judgment reversed, with costs above and below, and new trial awarded.

ANDERSON v. FETZER et al.

(44 N. W. 838, 75 Wis. 562.)

Supreme Court of Wisconsin. Jan. 28, 1890.

Appeal from circuit court, Door county; SAMUEL D. HASTINGS, Jr., Judge.

This action is to recover \$411.02, being the proceeds of 6,603 cedar posts sold by the defendants on commission for the plaintiff. The defendants counter-claimed, and alleged, in effect, that January 27, 1887, the plaintiff entered into a contract in writing with the defendants as follows: "Received of Youngs & Fetzer five hundred dollars on account of ties now on hand on Harris dock, at Bay View, Door county. Said Youngs & Fetzer is to advance E. N. Anderson at the rate of 18 cents on each good cedar tie bought by him, said ties to be owned by said Youngs & Fetzer; and when shipped all profits on said ties to be equally divided between Youngs & Fetzer and said E. N. Anderson, said Youngs & Fetzer to furnish above amount on each good tie, and said Anderson to do all necessary labor in buying, shipping, etc., to offset the use of money furnished by said Youngs & Fetzer. There is up to date 3,625 cedar ties on above dock. E. N. ANDERSON. Bay View, January 27th, 1887. Accepted. YOUNGS & FETZER." That under said contract the defendants advanced moneys to the plaintiff on said ties, as therein mentioned, and also on said posts indiscriminately, to the amount of \$1,800. The plaintiff replied to the counter-claim, and denied each and every allegation thereof. A jury being waived by the parties, the cause was tried by the court, and at the conclusion the court found, as matters of fact: (1) That, during the year 1887, the defendants were copartners, doing business in Door county, Wis.; (2) that January 27, 1887, the plaintiff and defendants entered into the written contract of which a copy is given above; (3) that prior to March 18, 1887, the defendants had advanced to the plaintiff undersaid contract the sum of \$900, and said plaintiff had bought for said defendants about 6,000 ties, including culls; (4) that March 18, 1887, said plaintiff had on hand, belonging to himself, about 6,000 cedar posts; (5) that on March 18, 1887, the plaintiff was in great need of funds to meet an obligation to a third party then pressing him, and obtained from the defendants a further advance of \$700, to be repaid in good ties, under said contract, and posts at an advance of one-half cent each over the price paid for them by the plaintiff; (6) that pursuant to said agreement the plaintiff delivered to the defendant 6,603 cedar posts of four different sizes and prices, and which, at the prices agreed upon for them, amounted to \$411.04; (7) that the plaintiff purchased and delivered to the defendants, under said written contract, 7,568 good ties, amounting, at the contract price of \$.18 each, to \$1,362.24; (8) that no profits were realized on the sale of said ties; (9) that the plaintiff paid the sum of \$33 for dockage on said cedar posts, but it does not appear that he was authorized or requested to do so by said defendants. As conclusions of law the court finds: (1) That

the plaintiff is entitled to judgment against the defendants for the sum of \$411.04 for posts, and said sum of \$1,362.24 for ties, less the sum of \$1,600, advanced as aforesaid, to-wit: for the sum of \$173.27, with interest from February 11, 1888, amounting in the whole to \$180.48, with costs, and judgment was ordered to be entered thereon accordingly. From the judgment so entered the defendants bring this appeal.

Hamilton & Bachus, (Turner & Timlin, of counsel,) for appellants. O. E. & Y. V. Dreutzer, for respondent.

CASSODAY, J., (after stating the facts as above.) It is claimed that the trial court found a balance due the plaintiff on the counter-claim of the defendants, and not upon the plaintiff's cause of action. The complaint was for the proceeds of cedar posts, as stated. The counter-claims were for advances and payments made on account of the ties and fence posts indiscriminately. The trial court found, in effect, that the \$900 was advanced upon the ties, and the \$700 on ties and posts, and that the proceeds of the ties and posts received by the defendants from the plaintiff amounted, in the aggregate, to \$1,773.28, or \$173.28 in excess of the moneys so advanced. We cannot hold that the mere form of the issues precluded the plaintiff from recovering the true balance in his favor on account of both ties and posts, since it was considerably less than the amount claimed in the complaint.

The principal contention of the defendants is that the evidence fails to support the seventh finding of fact, as to the number of "good ties" purchased by the plaintiff, and delivered to the defendants, under the written contract set forth. It is claimed that a large per cent. of the ties therein mentioned were culls, or rejected, and did not pass inspection in Chicago, where it was understood they were to be sold, and were in fact sold by Wm. Ripley & Sons, as agents for and on account of the defendants.

The evidence principally relied upon by the defendants to prove that a large per cent. of the ties thus delivered were not "good cedar ties," within the meaning of the contract, is a written statement, made by Wm. Ripley & Sons, of a cargo of such ties therein said to have arrived in Chicago April 18, 1887, by the vessel Thomas H. Smith, on account of the defendants, and another such statement made by them of ties therein said to have arrived July 15, 1887, by the vessel Eliza Day, on account of the defendants. Neither of these statements were sworn to, nor verified in any way. Neither of the firm of Wm. Ripley & Sons, nor any one in their employ, nor any other person, testified to the facts contained in either of those statements. The written contract contains nothing which could make such statements evidence. Such statements made by agents of the defendants were no more admissible in their behalf than their own statements. They were mere hearsay, and hence were properly rejected. The defendants admitted that there was no standard for good ties in Chicago; that whether a given quantity of ties passed inspection there or not

depended very much upon the supply and demand; that at times perfectly good ties were classed as inferior in that market, and at other times the reverse; that a good tie in Door county meant a tie of certain dimensions and sound. Their proofs fail to show that the ties delivered fell below that standard. They were not kept separately in Chicago, but piled in with others. The written contract states that there were 3,625 on the dock at the time it was made. The defendants saw them at the

time. There is evidence to the effect that when the advances were made, March 18, 1887, there were some 6,000 ties on the dock, open to the inspection of the defendants; that all the bad ties were thrown out before shipment; and that the plaintiff delivered the number of good ties found by the court. Upon the evidence in the record, we would not be justified in disturbing the seventh, nor any, of the findings of the trial court. The judgment of the circuit court is affirmed.

OSKAMP et al. v. GADSDEN.

(52 N. W. 718, 35 Neb. 7.)

Supreme Court of Nebraska. June 11, 1892.

Error to district court, Douglas county; Clarkson, Judge.

Action by Clemens Oskamp and others against James Gadsden for damages for the alleged breach of a contract to deliver a quantity of hay. Verdict and judgment for defendant. Plaintiffs bring error. Affirmed.

Isaac Adams, for plaintiffs in error. Richmond & Legge, for defendant in error.

NORVAL, J. Plaintiffs in error brought suit in the court below to recover damages for the alleged breach of contract by the defendant in his refusing to deliver a quantity of hay claimed to have been purchased by them from him. The jury returned a verdict for defendant, upon which judgment was entered.

In 1888 plaintiffs were engaged in the city of Omaha in the flour, feed, grain, and hay business. Defendant resided at Schuyler, and had about 150 tons of hay which he desired to sell. Prior to the middle of April of that year plaintiffs and defendant had some correspondence about the purchase and sale of this hay, but no contract was entered into at that time. On May 1, 1888, defendant sent the following letter to plaintiffs: "Oskamp, Haines & Co., Omaha, Nebraska—Gentlemen: What is your price for pressed hay now? Mine is still for sale, if I can get as much as others are getting. I would rather close out the entire amount at once if I can find a customer, and will give the use of my barn till July 14th, if buyer wants to speculate. There is scarcely any hay left here. Some on the prairie will not be hauled this season on account of bottoms being covered with water. Yours, truly, James Gadsden." In answer to the above, plaintiffs wrote defendant as follows: "Omaha, May 2d, 1888. Mr. James Gadsden, Schuyler, Neb.—Dear Sir: Answering yours of the 1st, the market seems to be glutted now with hay. Have bought some at \$7.75 on track since we bought that of yours. If you want to sell now, and mean business, we will give you \$8.25 per ton on track here, if it is all like the cars we had; but we do not leave this offer open longer than Saturday, but we prefer acceptance by wire, as we are figuring upon 800 tons at a trifle better price, sample car now coming, and, if we get that all, have got to crowd the market here. Have about 140 tons bought now, and would not want yours at any price with that large lot. We would not take the risks of your barn an hour, and you could ship it all as fast as you please, having storage for 500 tons. Our full storage capacity here is 1,000 tons. Now, about weights, you can have any one weigh it here after testing our track scale, or we will pay you by the bale. Oskamp & Haines." On May 7th defendant

called at the telephone office in Schuyler, and requested the operator to call up plaintiffs, as he desired to talk to them. Plaintiffs have a telephone in their office, and Mr. Haines, one of the firm, answered the call, but, owing to the condition of the atmosphere, the line was not working well, so that the parties were unable to communicate directly with each other. The telephone operator at Fremont, an intermediate station between Omaha and Schuyler, proposed to and did transmit defendant's message to plaintiffs, and repeated their answer to the defendant. The entire conversation was carried on through the assistance of the operator at Fremont, she repeating the message of each party. It is agreed that a contract was entered into at that time by telephone, but there is a conflict in the evidence as to its terms. The plaintiffs introduced testimony tending to show that defendant sold his entire lot of hay at \$8.25 per ton on track in Omaha, to be shipped two car loads per day. On the other hand, the testimony of the defendant goes to show that plaintiffs' proposition contained in their letter of May 2d was not accepted by defendant, but that the contract was for only two car loads. Two car loads of hay only were shipped to and received by plaintiffs. Subsequently defendant brought an action against plaintiffs to recover for said two car loads of hay, in which Gadsden recovered the full amount claimed, which judgment plaintiffs in error have paid.

The burden was upon the plaintiffs to establish the contract and breach of the same substantially as alleged by them. The jury passed upon the conflicting testimony, and by the verdict found that the terms of the contract respecting the quantity of the hay sold were as claimed by the defendant. We are satisfied that there is not such a preponderance of the evidence in the plaintiffs' favor as to justify us in disturbing the finding.

Error is assigned because the court admitted the testimony of the defendant as to the conversation over the telephone between the witness and Mr. Haines, one of the plaintiffs, as repeated over the wire by Mrs. Cummings, the telephone operator at Fremont. It is contended that the testimony of the witness of what the operator repeated to him as the conversation progressed as being said by Mr. Haines is irrelevant and hearsay. The question thus presented is a new one to this court, and there are but few decided cases which aid us in our investigation. But upon principle it seems to us that the testimony is competent, and its admission violated no rule of evidence. It was admissible on the ground of agency. The operator at Fremont was the agent of defendant in communicating defendant's message to Haines, and she was also the latter's agent in transmitting or reporting his answer thereto to defendant. The books on

evidence, as well as the adjudicated cases, lay down the rule that the statements of an agent within the line of his authority are admissible in evidence against his principal. Likewise, it has been held that, where a conversation is carried on between persons of different nationalities through an interpreter, the statement made by the latter at the time the conversation occurred as to what was then said by the parties is competent evidence, and may be proven by calling persons who were present and heard it. This is too well settled to require the citation of authorities. There are certainly stronger reasons for holding the statement made by the operator and testified to by defendant is admissible than in the case of an interpreter. Both Haines and defendant heard and understood the operator at Fremont, and knew what she was saying, or at least could have done so. Each knew whether his message was being correctly repeated to the other by the operator. Not so where persons converse through an interpreter. If the testimony objected to was incompetent, and hearsay, then the testimony of Haines, relating to the same conversation, should, for the same reason, have been excluded. He did not hear what defendant said, but testified to what the operator reported as having been said. The operator at Fremont was not the agent of the defendant alone, but she was plaintiffs' agent in repeating their answer to defendant's message. That conversations held through the medium of telephone are admissible as evidence in proper cases cannot be doubted. Such have been the holdings of the courts in cases where the question has been before them. In a criminal case—*People v. Ward*, 3 N. Y. Cr. R. 483—it was held that, where a witness testifies that he conversed with a particular person over the telephone, and recognized his voice, it was competent for him to state the communication which he made. In *Wolfe v. Railway Co.*, 97 Mo. 473, 11 S. W. 49, it was ruled that if the voice is not identified or recognized, but the conversation is held through a telephone kept in a business house or of-

fice, it is admissible; the effect or weight of such evidence, when admitted, to be determined by the jury. See *Printing Co. v. Stahl*, 23 Mo. App. 451.

A case quite analogous to the one at bar is *Sullivan v. Kuykendall*, 82 Ky. 483. In that case the parties did not have conversation directly with each other over the telephone, but conversation was conducted by an operator in charge of a public telephone station at one end of the line. It was held that the conversation was admissible in evidence, and that it was competent for the person receiving the message to state what the operator at the time reported as being said by the sender. The court in the opinion say: "When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him an agent to repeat what he is saying to another party; and in such a case certainly the statements of the operator are competent, being the declarations of the agent, and made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that, in case he is not talking with the one for whom the information is intended, it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because a person using a telephone knows that there is one at each station, whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence." Our conclusion is that the court did not err in admitting the testimony of the defendant.

It is claimed that the court erred in refusing certain instructions requested by plaintiff, but, as they raise the same question we have been considering, the objections will be overruled without further comment. The judgment below is affirmed. The other judges concur.

PROCTOR v. OLD COLONY R. CO.

(28 N. E. 13, 154 Mass. 251.)

Supreme Judicial Court of Massachusetts.
Barnstable. June 29, 1891.

Exceptions from superior court, Barnstable county; ROBERT C. PITMAN, Judge.

Action by Joseph L. Proctor against the Old Colony Railroad Company for damages for setting back fresh water upon his premises. The evidence tended to show that when the road was built the waters of a creek were discharged from the premises by a stone culvert. Afterwards the culvert was filled, and a drum substituted. Defendant offered evidence tending to show that the change had been made at the request of plaintiff's grantor. The plaintiff testified that he had had numerous conversations with the officers of the company as to his damages. He was then asked the following questions: "(1) Whether or not, at any time, any denial of liability has been made by defendant or any of its officers. (2) Whether or not, in these interviews, the officers ever referred to any agreement by you or your grantor about handling the water through a drum. (3) When did you first hear, if at all, that the company denied liability? (4) Whether or not the company or its officers ever denied your right to have a culvert at this point." The court excluded these questions on the ground that the conversations, and not the inferences or understanding of plaintiff, were admissible. Plaintiff also offered to prove that when he called on the president of the company about his claim he was referred to Judge Harriman, the president saying, "We want to leave it to our attorney, Judge Harriman," and that after examining plaintiff's books and evidence Judge Harriman stated that a certain sum of money was due plaintiff. The court refused this offer. Afterwards the defendant's superintendent testified that the company and plaintiff had agreed to refer the claim to Judge Harriman; and after the testimony was closed plaintiff formally offered to show this agreement, which consisted of letters, but the court excluded it as not rebutting. There was a verdict and judgment for defendant, and plaintiff brings exceptions.

Charles F. Chamberlayne, for plaintiff.
J. H. Benton, Jr., and *C. F. Choate, Jr.*, for defendant.

C. ALLEN, J. The plaintiff testified that he had numerous interviews with the president, general manager, and division superintendent of the defendant company concerning his damages caused by the setting back of the waters of Bridge creek upon his premises, and then sought to show that in the discussions which took place between him and them they did not deny the defendant's liability for damages. There was no objection on the ground that these officers were not authorized to speak for the defendant upon the subject, but the court excluded the questions on the ground that the conversations, and not the inferences or understanding of the plaintiff, were admissible. It seems to us that this was too narrow a view of the

matter. If, in point of fact, the defendant's officers, in discussing the plaintiff's claim for damages with him, did not deny the defendant's liability for damages, the omission to make such denial might be considered by the jury. It would be in the nature of an admission, subject, of course, to be explained, but competent and proper to be laid before the jury. This is not like cases where a party is so situated that no inference can be drawn from his silence, when a statement is made in his presence. *Com. v. Kenney*, 12 Metc. (Mass.) 235; *Com. v. Harvey*, 1 Gray, 487. If a party is so situated that he is not called upon to say anything, and does not say anything, his silence, under such circumstances, is not to be taken as furnishing any ground for an inference that he thereby made any admission. But in the case at bar there was evidence tending to show that the plaintiff had presented to the defendant's officers a claim for damages, and that the matter was under discussion at different interviews. If, under these circumstances, they made no denial of the defendant's liability while discussing the subject, the fact of such omission might properly be considered by the jury. It does not amount to an estoppel, but it is evidence as bearing upon the question to be determined. It is conduct which is in the nature of an admission, if in such discussion the defendant's officers made no pretense that the defendant was not liable. *Parsons v. Martin*, 11 Gray, 111; *Pray v. Stebbins*, 141 Mass. 219, 224, 225, 4 N. E. Rep. 824; *Hayes v. Kelley*, 116 Mass. 300. It is somewhat like an omission to testify, or to produce books, or to furnish explanations, when called on to do so. *Whitney v. Bayley*, 4 Allen, 173; *Cheney v. Gleason*, 125 Mass. 166, 176; *Huntsman v. Nichols*, 116 Mass. 321; *McDonough v. O'Neil*, 113 Mass. 92; *Eldridge v. Hawley*, 115 Mass. 410. The presiding justice appears to have excluded the questions on the ground that the conversations themselves, when testified to, would show whether or not the defendant's officers denied that the defendant was liable. This would be so if there were a single brief conversation, the whole of which could be given. But, where there have been numerous interviews with different officers, it is not to be supposed that the whole of every conversation can be given; and in such case the plaintiff ought to be allowed to testify, once for all, that never at any time was there a denial of liability. The practical question is, how shall the result be reached of getting before the jury the fact that no such denial was made? It seems to us, under the circumstances presented by the bill of exceptions, the plaintiff ought to have been allowed to answer the first, second, or fourth questions which were put to him by his counsel, so as to be able to present to the jury distinctly his claim that there never had been any denial of liability. It was of course entirely proper to call for the whole of all the conversations; but, since it is not to be supposed that every word can be repeated, the plaintiff should have been allowed to ask the general question which was excluded. The third question is only significant as supporting the same

view, and of itself alone would properly be excluded.

The plaintiff, in putting in his case in chief, offered to show certain statements by Judge Harriman as the result of an examination of the premises made by him. This evidence was properly excluded. It would not follow from the plaintiff's offer of proof that Judge Harriman was re-

ferred to in such a way as to constitute him an agent for the defendant, with authority to make admissions or promises to the plaintiff. *Rosenbury v. Angell*, 6 Mich. 508. The subsequent more formal offer after the close of the defendant's case might properly be excluded, in the discretion of the court, as too late. Exceptions sustained.

McLEOD et al. v. SWAIN.

(13 S. E. 315, 87 Ga. 156.)

Supreme Court of Georgia. April 20, 1891.

Error from superior court, Emanuel county; James K. Hines, Judge.

Williams & Brannen, Saffold & Warren, and Rogers & Potter, for plaintiffs in error. Twiggs & Verdery and H. R. Daniel, for defendant in error.

LUMPKIN, J. Mrs. Swain brought an action of ejectment against McLeod et al. for the recovery of a tract of land in Emanuel county. The evidence was conflicting, and sufficient to sustain a verdict for either side. The jury found for the plaintiff. After Mrs. Swain had proved by her own testimony that a certain Mrs. Wiggins, who at one time was in possession of the land and remained in possession for many years, until her death, was her tenant, the court, over defendants' objection, admitted proof of declarations made by Mrs. Wiggins, while in possession of the land, to the effect that she held it as the tenant of plaintiff, and that it was the land of plaintiff. The only question of law presented in this case for our determination is whether or not this testimony was properly admitted. Section 3776 of the Code declares that "the declarations and entries of a person, since deceased, against his interest, and not made with a view to pending litigation, are admissible in evidence in any case." It was contended in the argument that such declarations should be received only against the declarant, and those in privity with or claiming under him; but this view does not seem to be sustained by the authorities. It was held in the case of Peaceable v. Watson, 4 Taunt. 16, that "the declarations of a deceased occupier of land of whom he held the land are evidence of the seisin of that person;" and in Davies v. Pierce, 2 Term R. 53, that "declarations by tenants are admissible evidence after

their death to show that a certain piece of land is parcel of the estate which they occupied." In both these cases the declarations admitted were made by persons not in privity with any of the parties to the record, nor did any of such parties in any way claim title through or under the declarants. Again: "Statements of a deceased occupier touching his title are admissible in evidence generally, without reference to the particular effect they may produce in the cause." *Carne v. Nicoll*, 27 E. C. L. 707. See, also, *Barry v. Bebbington*, 4 Term R. 514. We find the following in 1 Taylor, Ev. § 684: "Under the head of declarations against proprietary interest may be classed the statements made by persons while in possession of land, explanatory of the character of their possession; and it is now well settled that such declarations, if made in disparagement of the declarant's title, are receivable, not only as original admissions against himself and all persons who claim title through him, but also as evidence for or against strangers. Whether in this latter event they are admissible in the life-time of the declarant, or only in cases where his death can be proved, is a point which does not appear to have been distinctly decided. In most of the cases where the evidence has been received, the declarant was dead; but on two occasions, at least, the evidence was admitted, though the declarant was living." Wharton also lays down the rule that such evidence is admissible, not only against privies, but strangers. "The reason for this conclusion is that possession implies, *prima facie*, an absolute interest, and any statement which would tend to limit it to a less interest is self-disserving." 2 Whart. Ev. § 1156. The same principle is stated in 1 Greenl. Ev. § 109, and the same reason for the admissibility of such declarations is there given. These authorities abundantly sustain the correctness of the ruling made by the court below, and its judgment is therefore affirmed. Judgment affirmed.

HILLS v. LUDWIG.

(24 N. E. 596, 46 Ohio St. 373.)

Supreme Court of Ohio. March 26, 1889.

Error to circuit court, Crawford county.

Ejectment by Solomon Ludwig against Jedediah Hills for a strip of land bounding plaintiff's tract on the east. Besides a general denial, the answer set up the 21-year statute of limitations, and alleged additional defenses, as follows: "(3) That in 1860, the location of the true lines between the lands of plaintiff and the adjoining tracts not being ascertained, a survey was had by agreement between plaintiff and defendant's grantors, and a dividing line established, which has ever since been recognized by the owners of the lands; (4) that defendant owns lands both on the east and on the west sides of plaintiff's lands; that the lines on both sides of plaintiff's land were established as stated in the third defense; and that the quantity of land cut off by the new line from the east side of plaintiff's land was compensated by the strip thus added on the west side, whereby plaintiff received as much land as his deed called for." The judgment of the court of common pleas in favor of plaintiff was affirmed by the circuit court, and defendant brings error.

S. R. Harris and B. Blakford, for plaintiff in error. *Finney, Eaton & Bennett* and *W. Z. Davis*, for defendant in error.

BRADBURY, J. The lands of Ludwig lie west, and those of Hills east, of the disputed line; and this line was originally identical with that between sections 5 and 6, in which the lands lie. This section line had been the subject of dispute between adjoining proprietors for many years prior to 1860. Early in that year, an agreement was made between a number of land-owners in those sections for a survey of this line, which survey, pursuant thereto, was made in March, 1860, by Horace Martin, the then county surveyor. At the same time, and as part of the same plan, the north and south middle line of section 6 was surveyed. By this survey both lines were located further west than they were before, so that Ludwig gained thereby on the west substantially the quantity of land he lost on the east. Soon thereafter Ludwig, Hills' grantor, and some other adjoining owners began to occupy and improve their lands according to the new line, which was called the "Martin Line," though with considerable dissatisfaction and some litigation between certain of the adjoining proprietors respecting it. Soon after this line was established, Hills purchased lands lying east of and adjoining those of Ludwig, and also a tract adjoining Ludwig on the west; both of which he has continued to occupy and improve ever since, up to the Martin line. Twenty years and 10 months elapsed from the time Ludwig went out of possession of the lands in dispute until this action was begun, and more than 22 years elapsed before the amended petition was filed. The trial resulted in a verdict and judgment for Ludwig, for the recovery of all the lands described in his amended petition.

Hills took a bill of exceptions, which exhibits, among others, the fact above stated. It also discloses certain exceptions taken by Hills to the rulings of the trial court in admitting and rejecting evidence, and in charging and refusing to charge the jury certain propositions of law. The judgment was affirmed by the circuit court, whereupon the defeated party brought the case here for review.

Some of the interesting questions argued by counsel for plaintiff in error are not presented by the record in a way to enable this court to review them upon their merits. This is notably the case with respect to two important questions, alluded to by counsel for plaintiff, in his brief,—that of estoppel, and that relating to the rejection of the evidence of Milliron, respecting the acts and admissions of the plaintiff below, Ludwig.

The question of estoppel is raised by the fourth defense. That defense, plaintiff in error claims, sets forth facts which estop Ludwig from asserting his title to the lands in dispute; or, at least, that he ought not to be permitted to do so, even if he was honestly mistaken in supposing the Martin line to be the true one, until he first offered to yield up to Hills the equivalent thereof, which he still holds on the west side of his farm; and there is evidence tending to establish this defense. It is a grave question whether Ludwig can be permitted to repudiate the Martin line on one side of his land, where it cuts a strip from his farm, and cling to it on the other side, where it gives him a strip of land that otherwise would belong to Hills. The court said nothing to the jury on this question that is applicable to the facts as Hills claims them to be, and there is nothing in the record to show whether it was considered by the jury or not. This omission, standing alone, does not constitute error for which the judgment will be reversed by this court. *Taft v. Wildman*, 15 Ohio, 123; *Jones v. Ohio*, 20 Ohio St. 34; *Schryver v. Hawkes*, 22 Ohio, 308; *Smith v. Railway Co.*, 23 Ohio St. 10. The defendant below, however, did request instructions on this point which the court refused to give to the jury; but these instructions, while fairly applicable to a state of facts testified to by Hills, were not, at least, fully applicable to the facts pleaded by Hills in his fourth defense, and for that reason the refusal was not error. In addition to this, Hills, when he requested the charge on this point, also requested the court to give to the jury eight other propositions of law, some of which, being unsound, were properly refused; while others, containing sound legal propositions, should have been given to the jury if presented by themselves. All, however, were refused; but the exception thereto being general, it failed to point out to the court the error of which complaint is now made, and for that reason error cannot be predicated on this action of the trial court. *Railway v. Probst*, 30 Ohio St. 104; *Everett v. Sumner*, 32 Ohio St. 562; *Powers v. Railway Co.*, 33 Ohio St. 429. It remains apparent, however, that the court did not instruct the jury on this point, notwithstanding its attention was called to the matter. Though done through the medium of an instruction, it

was not error to refuse to give it to the jury; and it may be said that the record raises the question whether it is error for the court to fail to give instructions on a question involved in the trial, when, by any means, its attention is directed to it. The record, however, does not disclose that this question was made to the trial court on the motion for a new trial, or to the circuit court on error; and there is nothing in this case that calls for us to disregard the general rule that errors not assigned in the court below will not be considered here. *Levi v. Daniels*, 22 Ohio St., 38. The rule applies with special emphasis to the case at bar, for the additional reason that that omission is not especially assigned in this court of error, but is insisted on in argument only, as an error appearing on the face of the record. We therefore hold that the question is not properly before us for review.

Respecting the evidence of the witness Milliron, it may be said that while, as a general proposition of law, the pertinent acts and admissions of a party are competent evidence against him, yet, unless they are offered at the proper time, it is within the discretion of the court to admit or reject them, and, unless the record discloses an abuse of discretion, its action will not be reviewed on error. *Webb v. State*, 29 Ohio St., 351. If, on the trial, Milliron's evidence was competent at all, it was evidence in chief for the defendant, Hills. He did not offer it then, and, without explaining the omission, offered it in rebuttal. Under these circumstances, the action of the trial court in rejecting the evidence does not appear to be erroneous.

The trial court admitted in evidence, over the objection of Hills, the record of an action brought in 1865 by Rufus Page against the plaintiff below, Ludwig. This action related to the north and south line, before referred to, that divided section 6 into half sections, and which was run and established at the same time, and was part of the scheme of the Martin survey. If that line had been placed too far west by the Martin survey, then the line in dispute had been also placed the same distance too far west. This record shows that Page, under whom Hills claimed title, alleged that the middle line of section 6 was too far west, and that he prevailed in the action. Now this allegation and adjudication coming to the ears of the jury could not be otherwise than prejudicial to Hills; and, if incompetent evidence, is error to his prejudice. It is not merely an admission, but a sworn statement, made by one under whom Hills claims title, that the line is not where Hills claims it to be. Now, if it had been made while Page owned the land, especially if it related to the line of the land Hills afterwards bought, it would have been admissible against Hills. But this was not the case; it related to other lands, and was made after Hills had acquired his title. Page, at the time, had no interest in this land of Hills, and could not, by any act, admission, or statement, make evidence against Hills. It was therefore error to admit the record in evidence. For the same reasons, the agreement between Page and Ludwig, and the

record of the action between Ludwig and Frey, were incompetent evidence, and their admission erroneous.

The defendant below specially excepted to certain propositions contained in the charge of the court. These charges are properly before us for review, and will now be considered. Hills excepted to the rule laid down by the court respecting the method of retracing the line between sections 5 and 6. This was an important question in the trial court, and might have been decisive, in view of the evidence then adduced; but we have no assurance that the evidence at the next trial will be the same that it was at the last in this respect. This is a species of evidence peculiarly liable to change. A new line, run even by the same surveyor, upon the same principle, may vary considerably from the former line run by him, according to the method approved by the court below. New corners may be found, or new lines run, or new facts discovered, that would render the view this court might take wholly inapplicable; and, besides, the other principles laid down by the court are likely to be decisive of the rights of these parties. The court charged the jury that the contract or agreement by which a boundary line could be established must be one "that would transfer the title or right of possession to defendant, Hills." The second clause of the syllabus in *Bobo v. Richmond*, 25 Ohio St., 115, reads: "The fixing of a boundary line by parol is not within the operation of the statute of frauds. No estate is thereby created; but where the boundary line is fixed by the parties, they hold up to it by virtue of their title-deeds, and not by virtue of the parol transfer." The language of the charge is calculated to impress the jury with the belief that an agreement to adjust and settle the boundary line must be one sufficient to transfer title or right of possession by its inherent force, independent of the acts of the parties pursuant thereto. This is contrary to the syllabus above quoted. Hills did not rest his defense upon the agreement alone, but upon it and the acts of the adjoining owners, done pursuant thereto; and the charge ought to have been as broad as the defense in this particular.

The court also charged the jury that, "when the line between owners of land cannot with certainty be ascertained, and said owners, in the view of this, agree upon and establish a line, such an agreement settles the line." It is claimed in argument that the defendant below was not prejudiced by this charge, even if it is incorrect, because no evidence was given on trial which tended to prove any such agreement. To this claim it may be said that what the parties to this survey said and did was before the jury, and it was competent for them to determine what their object was in causing it to be made. Ludwig claimed their purpose was to ascertain the true line; that he supposed that they had done so; that he knew no better for many years thereafter; and that when he discovered the mistake he endeavored to correct it. Hills, on the other hand, claimed the purpose of the

survey was not to find the true line, but to adjust and settle one which had long been the subject of contention, and about which there was then a dispute. This being the issue, the court, we think, placed the right of adjoining proprietors to adjust and settle disputed boundaries on too narrow a basis. It is not essential that the disputed boundary line be incapable of ascertainment; but if it has been the subject of dispute and contention, and the parties, with the view to settle the dispute, agree upon and settle a line between their land, it is a finality, and cannot be disturbed, though they afterwards learn that the true line could have been found. *Avery's Lessee v. Baum's Heirs*, Wright, 576; *Walker v. Lessee of Devlin*, 2 Ohio St., 593. This view is entirely consistent with the principle that where adjoining proprietors, in attempting to find the true line between them, by mistake fix upon an incorrect one, they may repudiate the

spurious line at any time before the statute of limitation has run.

The court further charged the jury that "this action was commenced on January 11, 1881. It is conceded that was 20 years and 10 months after the plaintiff went out of the possession of the premises; therefore the statute of limitations does not apply." This statement ignores the fact that part of the lands sought to be recovered were not described in the original petition. Over 22 years had in fact elapsed from the time plaintiff below went out of possession before he filed his amended petition, so that, as to the land then for the first time included, the statute of limitations had attached, and defendant's title made perfect by lapse of time, unless the amendment had a retroactive operation, and went back, by relation, to the original petition. This proposition, we think, is not supported by either reason or authority. Judgment reversed.

SMITH et al. v. BOYER et al.

(45 N. W. 265, 29 Neb. 76.)

Supreme Court of Nebraska. March 11, 1890.

Error to district court, Red Willow county; COCHRAN, Judge.

R. M. Snively and *E. M. Bartlett*, for plaintiffs in error. *G. M. Lambertson*, *Fittenhouse & Starr*, and *H. W. Keyes*, for defendants in error.

MAXWELL, J. On the 24th of September, 1887, the defendants executed and delivered to the First National Bank of Indianola and L. J. Holland a chattel mortgage upon "all our general stock of merchandise, consisting of dry goods, groceries, boots and shoes, hats & caps, crockery, clothing, notions, jewelry, safe, and show-cases, fixtures, and all our other goods and merchandise contained in the brick building, store-houses, and basement, situate on lot 6, block 33, in the town of Indianola, Nebraska. Also our books and book-accounts held and owing to us, the said firm of Boyer & Davidson, on account of our business in said store above named,"—to secure the payment of \$5,336.46, of which sum \$2,000 is alleged to have been due the bank, and the remainder to Holland. The exact value of the property mortgaged does not appear, but there is testimony that the goods were of the value of about \$12,000, while the amount due on the accounts is not shown. On the 26th day of September, 1887, the plaintiffs commenced an action by attachment against the defendants; the grounds therefor, as stated in the affidavit for an attachment, being "that the defendants have sold, assigned, and disposed of their property with the fraudulent intent to cheat and defraud their creditors, and hinder and delay them in the collection of their debts, and are about to sell, assign, and dispose of their property with the fraudulent intent to cheat and defraud their creditors, and hinder and delay them in the collection of their debts, and that they are about to convert their property into money for the purpose of placing it beyond the reach of their creditors, and are about to sell, assign, and dispose of a part of their property with intent to defraud their creditors, and have sold, assigned, and disposed of a part of their property with the intent to defraud their creditors." Upon this affidavit being filed, and a like affidavit for garnishment, and an order of the court obtained, part of the debt not then being due, a writ of attachment was issued and delivered to the sheriff at 8 o'clock P. M. of said day, and returned, "not being able to come at the property of Boyer and Davidson, or James J. Boyer or Charles B. Davidson, members of said firm, claimed to be in the possession of L. J. Holland, J. W. Dolan, the First Nat'l Bank," etc. Notice was served upon the persons garnished, naming them, and requiring them to appear and answer, etc. The defendants filed a motion, supported by affidavits, to dissolve the attachment upon substantially two grounds, viz., irregularity in procuring the same, and because the grounds upon which the attachment was granted were untrue. Affidavits in oppo-

sition to and in support of the attachment were thereupon filed, and on the final hearing the attachment was discharged, and the garnishees released. The dissolution of the attachment is now assigned for error.

It seems to be conceded by the attorneys for the plaintiff that the claim of the national bank is *bona fide*, and probably that of Holland. The chattel mortgage seems to have been procured through the instrumentality of the latter. A debtor in failing circumstances may pay one or more of his creditors, provided he deliver him no more than sufficient to pay the debt. In *Elwood v. May*, 24 Neb. 375, 38 N. W. Rep. 793, it is said: "A creditor may obtain from a failing debtor payment in full of his claim, and he will not be chargeable, upon that ground alone, of seeking to defraud other creditors. Neither will the fact that the claim is paid in goods of no greater value than the amount of the claim of itself establish the fraudulent character of the transaction. So far as the testimony discloses, the defendants in error were paid in goods of value not exceeding the amount of their claims against Cramer." To the same effect, *Rothell v. Grimes*, 22 Neb. 526, 35 N. W. Rep. 392; *Lefel v. Schermerhorn*, 13 Neb. 342, 14 N. W. Rep. 418; *Shelly v. Heater*, 17 Neb. 505, 23 N. W. Rep. 521. The case of *Grimes v. Farrington*, 19 Neb. 49, 26 N. W. Rep. 618, is not in conflict with these decisions, the exact value of the goods mortgaged not being shown. The highest estimate in that case was about \$14,000, while the debts secured exceeded \$9,000. It did not appear that the property would sell for more than the amount of the debts. While a *bona fide* creditor has a right to secure his claim, yet he has no right to tie up all the property of his debtor, where all of such property greatly exceeds in value the amount of the debt secured; in other words, while he may take adequate security for his own claim, he cannot hinder and delay, if not defraud, other creditors in the collection of their claims by placing the debtor's property beyond their reach. If he do so, he violates the law prohibiting fraudulent conveyances. The fact that the is a creditor does not give him a license to tie up property of the debtor not necessary for his own security, and prevent its application to the payment of other debts owing by the debtor; and, if the debtor assign him all his property to secure a grossly inadequate debt, other creditors have good cause to complain that the transfer is fraudulent as to them. In the case at bar the defendants had conveyed all their property to the mortgagees. Such property is shown to have been greatly in excess of adequate security for the debts, and *prima facie* this was sufficient to justify an attachment upon the grounds specified in the affidavit therefor. Fraud can rarely be proved by direct evidence, and in most cases necessarily must be shown by facts and circumstances; and among those which may be proved against himself are the declarations and acts of the debtor while claiming an interest in the property which he asserts he has conveyed. Thus in *Campbell v. Holland*, 22 Neb. 596, 35 N. W. Rep. 871, the court, by

COBB, C. J., quoting from *Carney v. Carney*, 7 Baxt. 284, says: "As a general rule, the declarations of a party made after he has parted with his interest in the subject-matter of litigation cannot be received to disparage the title or right of a party acquired in good faith previous to the time of making such declarations. But this very just and reasonable principle must be taken as inapplicable to cases of fraudulent sales of property. If, for example, a conveyance is made absolute on its face, and the vendor continues to retain possession of the property as before, this being *prima facie* evidence of fraud, a creditor impeaching such conveyance on the ground of fraud may be admitted to prove the declarations of the vendor, thus retaining the possession in relation to the ownership, or the character of his possession of the property."

A number of statements made by Boyer, and acts done by him, shortly after the attachment was levied, and while he still claimed an interest in the property, that tend to support the charge that the transfer was made to defeat certain of his creditors, are shown by the record, while the sheriff in an affidavit states "that on the 19th day of October, 1887, I had subpoenas put into my hands by J. H. Berge, of Indianola, a notary public, in the above-entitled cases, and also in behalf of Nave & McCord in their claim against Boyer & Davidson, to subpoena said James J. Boyer in all of said cases, and Chas. B. Davidson and Matilda Davidson and others in said above-entitled cases, to appear before said notary public, and give their depositions in said cases, respectively, on the 21st and 22d days of October, 1887, as shown by my returns on said subpoenas, and that said subpoenas were received on the 19th of October, 1887. That about the time said subpoenas were received, said James J. Boyer was here in town, but I made diligent search for him, and could not find him anywhere. His wife had already gone away. I went to his house on the 19th and on the 20th and on the 21st of October, 1887, and knocked at the door, and it was locked. After some talking of some persons in the house, and after some little time, L. J. Holland came to the door, and, on being asked where Boyer was, said he was not there, and did not know where he was, and that L. J. Holland was the only one to be seen in the house, although affiant did not search the house. I searched diligently in the country and in this town for said James J. Boyer, but could not find him. I learned that he had been seen

riding his trotting horse across into Kansas since I received said subpoenas. I have good reasons to believe that the said James J. Boyer knew that said subpoenas were in my hands before he left, and that he secreted himself, and hid away from me, and absconded into the state of Kansas, to avoid the service of said subpoenas, and to avoid giving his testimony in the above-entitled and above-mentioned cases. That said Matilda Davidson left on the train on the very same day that said subpoenas were placed in my hands to take her depositions, and as I am informed went to Denver. The said James J. Boyer said to me, about the time I was serving the execution on said oats heretofore mentioned, that I would not get his horse, referring to the trotting horse which I had had orders to serve execution against; that I thought I was pretty sharp, but I would not get the horse. He knew where it was, but I would not get it, and he would not tell me where it was. I was told that some one was seen driving that horse that evening, out west of town. Went out to Steve Lyons' place, but, not finding the horse there, came back. Met said James J. Boyer in the road about a mile out of town, and he skulked off in the weeds to keep me from knowing who he was. I searched diligently for the horse, but could not find him. I verily believe, and have good reasons to believe, that he was hiding away, secreting, and concealing said horse to prevent me from serving the execution against it, and to prevent his creditors from appropriating it to the payment of their demands, and that he has removed said animal out of this state with intent to keep me from serving said execution at that time in my hands." These statements are not denied by Boyer.

In the affidavits of the defendants for the dissolution of the attachment they swear to the honesty of their intentions. This statement would have had much greater weight if they had come into court, and made a full and detailed statement of their business, and the assets still in their hands, if any.

Had they done so, perhaps it would have been unnecessary to swear to a mere conclusion, and the latter is entitled to but little weight. The evidence fully sustains the grounds for the attachment, and the court erred in discharging it.

The judgment of the district court is reversed, the attachment reinstated, and the cause remanded for further proceedings. Reversed and remanded. The other judges concur.

IDAHO FORWARDING CO. v. FIREMAN'S FUND INS. CO.

(29 Pac. 826, 8 Utah, 41.)

Supreme Court of Utah. April 1, 1892.

Appeal from district court, Weber county; James A. Miner, Justice.

Action by the Idaho Forwarding Company against the Fireman's Fund Insurance Company on an alleged contract of fire insurance. Judgment for plaintiff. Defendant appeals. Reversed.

Bennett, Marshall & Bradley, for appellant. A. R. Heywood, for respondent.

ZANE, C. J. The respondent alleged in its complaint that on the 1st day of February, 1889, in consideration of \$46.20 paid as premium, its stock of goods at Hailey, Idaho, was insured in the sum of \$2,000 by appellant, for one year from the 13th day of the same month, and that on the 2d day of the following July the goods were destroyed by fire. The plaintiff relies upon a contract in presenti, not a contract to thereafter insure. Albert Kiesel, who had an interest in plaintiff's business, and was manager thereof, testified that B. M. Mallory, the agent of both parties, said to him about the last of January or the first of February, 1889, that \$5,000 of the insurance would expire; that witness told him to renew the insurance, and that he said he would; that the policies of the North British & Mercantile and Fireman's Fund and Commercial Union were about to expire; that Mallory said he would reinsure him in the Fireman's Fund for \$2,000, in the North British & Mercantile for \$1,000, and in the Commercial Union for \$2,000. Witness also said that the insurance was to be for one year, and that the premium was to be \$2.20 per \$100. B. M. Mallory, the agent of both plaintiff and defendant, testified that, soon after his employment as bookkeeper, Albert Kiesel, manager of the plaintiff, instructed him to renew all policies upon expiration, and to keep the amount of insurance to \$14,500, and to pay premiums 60 days after issuance of policies; that he was under the impression that the lapsed policies had been renewed; that his intention was to renew them, but he negligently had allowed them to lapse; that, as cashier of the plaintiff, he was authorized to use its funds to pay premiums, and was directed by plaintiff's manager to do so, and to keep the insurance to \$14,500. The premium was not paid, but was tendered six days after the stock of goods had been consumed by fire.

The proof is that Mallory, who was cashier of the plaintiff, and who was authorized and instructed by its manager to have its stock of goods insured, and who was also the agent of the defendant, and authorized by it to make contracts of insurance and to issue policies, neglected to do as he was instructed, and what he promis-

ed plaintiff's manager he would do. He had an impression, as he said, that the property was insured, and neglected to issue the policy. He was authorized to appropriate plaintiff's money, in his hands as its cashier, to the payment of the premium, but neglected to do that. If he had done so, he would have acted as plaintiff's agent in so doing. At the time of the conversation, about the 1st of February, relied upon to establish the contract declared on, insurance then on the property to be renewed had not expired. It did not expire until the 13th day of that month. It was the duty of Mallory, under the instructions of plaintiff's manager, to continue the risk after the old policy expired by reinsuring, but the evidence shows that he neglected to do this. For the failure to follow plaintiff's orders the defendant cannot be held responsible. It is apparent that Mallory failed to make the contract that he was authorized and instructed by plaintiff to make. An agreement to make a contract at a future day is not the equivalent of the one to be made, or of a present contract, though all the terms to be put in the latter are agreed upon. If one of the parties to the first agreement refuses to bind himself when the time comes, the court may compel a specific performance of it, if from the facts it would be equitable to do so; and if performance is decreed a judgment may be entered in the same case for the amount found to be due the plaintiff on the contract, if any amount is then due the plaintiff by its terms, or an action may be instituted on it if either party refuses to comply with it. By the language used on the 1st of February the defendant did not assume the risk the plaintiff contends that he did. That language had reference to insurance thereafter to be made.

The plaintiff has set up in his complaint a contract in presenti. This action is not for specific performance. *Taylor v. Insurance Co.*, 47 Wis. 336, 2 N. W. 559, and 3 N. W. 584; *Sargent v. Insurance Co.*, 86 N. Y. 626; *Dinning v. Insurance Co.*, 68 Ill. 414; *Markey v. Insurance Co.*, 118 Mass. 178; *Myers v. Insurance Co.*, 121 Mass. 338; *O'Reilly v. Corporation*, 101 N. Y. 575, 5 N. E. 568. *Commercial National Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318, cited by counsel for respondent, was an equity cause to complete the specific performance of a contract to make reinsurance. The court in that case held that the bill for the specific performance of the contract should be maintained, and it having been admitted that defendants would be liable as for a total loss on the policy if issued in conformity with the contract, and that the amount was then payable, and that no further question remained to be tried, and it was proper to decree the payment of the money which would have been payable on the policy if it had been issued. In *San-*

born v. Insurance Co., 16 Gray, 448, and Putnam v. Insurance Co., 123 Mass. 324, relied upon by respondent's counsel, it was held that the evidence tended to show that the risk was to commence at the time the contracts sued on were made. The facts of these cases are not analogous to the case in hand. In them the insurers assumed the risk by the contracts sued on.

After the witness Albert Kiesel had narrated the conversation between himself and Mallory on the 1st day of February, plaintiff's counsel propounded this question: "Now, if you know, how long was the insurance to be?" To which counsel for defendant objected on the ground that the conclusion of the witness was called for, and not the language used, or the substance of it. The objection was overruled by the court, and defendant excepted. This ruling is assigned as error. The intentions of the parties to contracts must be ascertained from the language used in them, or in making them, in the light of the surrounding circumstances, and this rule applies to the interpretation of verbal contracts as well as to written ones. It was improper to call for the conclusion of the witness as to the term of the insurance, or as to the premium to be paid. Those facts should have been found from the language used by the contractors. They could not be ascertained from the inferences and conclusions of the witness.

Witnesses were permitted, over the objections of defendant's counsel, to testify to admissions of the agent, Mallory, made long after the alleged contract was made, to the effect that the property was insured. To the ruling of the court in overruling such objections the counsel for the defendant excepted, and assigns the same as error. A witness may testify to the language of an agent in making an oral contract, because such language is within the agent's authority. Being authorized to make the contract, his language in making it is authorized by the principal. But authority to make a

contract does not empower the agent at a subsequent time to admit away his principal's rights. The admissions of an agent are admissible so far as the principal has authorized them to be made, and no further. Greenleaf says: "But it must be remembered that the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, et dum fervet opus. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all; and therefore it is not necessary to call the agent himself to prove it." 1 Greenl. Ev. § 113. The court said in the case of Railroad Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118: "Referring to the rule as stated by Mr. Justice Story in his treatise on Agency, (section 134.) that, 'where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestæ*.' The court, speaking by Mr. Justice Strong, said: 'A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ*.'" For the reasons above indicated the court is of the opinion that the judgment of the court below should be reversed, and that a new trial should be granted.

ANDERSON and BLACKBURN, JJ., concur.

OVER v. SCHIFFLING.

(26 N. E. 91, 102 Ind. 191.)

Supreme Court of Indiana. April 24, 1885.

Appeal from circuit court, Marion county.

H. Dailey and *G. W. Winpenny*, for appellant. *S. Claypool*, *W. A. Ketcham*, and *B. F. Watts*, for appellee.

ELLIOTT, J. The complaint of the appellee alleges that the appellant maliciously published a libel; that the libelous matter was contained in a letter written by the latter to a corporation called the "Encaustic Tile Company," by whom the appellee was then employed. The letter, omitting the date, address, signature, and formal part, is as follows: "Mr. Schiffing owes me on work done on your dies, etc., \$33. If you would consent to retain such amount out of any money due him from you, let me know by return mail. If you will not consent to do so, I shall have to file a mechanic's lien on the goods. He got them of me by lying. First he said he would bring an order from you. Then, he would pay cash for them before he took them away. He then watched his chances, and took them when the foreman was not in, and now refuses payment." It is also alleged that the appellee was dismissed from the service of the corporation to whom the letter was addressed, and he demanded special and general damages.

The language of the letter charges the appellee with having obtained property by corrupt and dishonest means. It is not necessary, in order to constitute even verbal slander, much less libel, that the charge that a corrupt or criminal act was committed should be made in direct terms. The question in such cases is, what meaning did the language employed convey to the mind of the person to whom it was addressed? *Seller v. Jenkins*, 97 Ind. 430. Words put in writing will often constitute a libel, which, if spoken, would not constitute actionable slander. We think it very clear that the corporate officers who received and read the letter must have understood that the writer charged the appellee with having obtained the property by fraudulent means, and, thus understood, the language was undoubtedly libelous. *Hake v. Brames*, 95 Ind. 161.

The letter was not a privileged communication. The information it professes to contain was volunteered, and the purpose for which it was conveyed to the appellee's employer was solely for the benefit of the writer, and was not intended to benefit the employer by giving him, in good faith and for a just purpose, information necessary for his protection against a knavish servant.

The appellant introduced Samuel Shue, and after he had been examined in chief, and had been cross-examined at great length, and at the close of the redirect examination, he was asked this question: "State whether or not you reported these facts in reference to this matter to Mr. Over." Upon objection being made, the counsel made this statement: "We offer to show that this witness communicated all these facts to Mr. Over before the 15th

day of June, the day the letter was written." In our opinion the offer was too general, for we do not believe it was the duty of the trial court to examine the mass of testimony to determine what facts were competent. On the contrary, we think it was counsel's duty to specifically state the facts which they expected to show that the witness communicated to their client. There were some facts stated in the testimony of the witness that it would not have been proper to communicate to the appellant, and the court was not bound to analyze the testimony, and sift out the competent from the incompetent. This should have been done by the question and offer of the counsel.

The appellee testified that he was directed by the appellant to his foreman, Mr. Cox, and thereupon the court permitted the appellee to testify what was said to him by the foreman. In this there was no error. Where a party directs another to a third person for information or directions, he is bound by the statements of such third person.

Our cases decide that, where the intent with which an act is done becomes material, it is proper to ask what it was. *City of Columbus v. Dahn*, 36 Ind. 330; *Greer v. State*, 53 Ind. 420; *White v. State*, 53 Ind. 595, (*vide* page 596;) *Shockey v. Mills*, 71 Ind. 288; *Parrish v. Thurston*, 87 Ind. 437, (*vide* page 440.) We think that the question asked the appellee, and objected to by the appellant, is fairly within the principle declared in these cases. It is competent in many cases, such as cases of fraud and the like, to ask a party a direct question, and we think this is an analogous case. So, too, where a negative is to be proved, it is often competent to ask a direct question. The reason for this is that, by proving affirmative facts to establish a negative conclusion, too much ground would be gone over, and too much time consumed. Another reason is that there are some cases where it is practically impossible to exclude every hypothesis by a course of affirmative questions, and, as the law is a practical science, it sometimes permits a direct question and answer upon a negative proposition. If it were conceded that the court erred in permitting the appellee to inquire as to the aggregate amount in value of dies that had been made by the Encaustic Tile Company, within a designated period, no available error was committed, for the reason that the grounds of objection were not specifically stated. But we think no error was committed, for the reason that the testimony tended to show the amount of the special damages sustained by the appellee.

The court refused to give the first instruction asked by the appellant, which reads thus: "The defendant in this cause, by his answer, admits that he wrote the letter which is alleged to be libelous, but says that the statements therein are true. By this answer the defendant only admits he wrote the letter; he does not admit that plaintiff was damaged thereby, or that he was in the employ of the Encaustic Tile Company. But the burden is on the plaintiff to show that he was in the

employ of the Encaustic Tile Company; and that he lost said employment by reason of said letter, and that he has been damaged." It is settled by many cases that, unless the instruction as prayed is correct in terms, the court is not bound to amend or modify it, but may rightfully refuse it. *Goodwin v. State*, 96 Ind. 550, and authorities cited. This instruction was not correct in terms, for the answer, by not directly controverting the allegation of the complaint, that the appellee was employed by the Encaustic Tile Company, admitted it, for the failure to deny is an admission of the truth of a material allegation. The general scope and tenor of the answer filed by the appellant is that of a plea of justification, and it is by its general scope and tenor that it must be judged, and not by fragmentary statements cast into it. *Kimble v. Christie*, 55 Ind. 140; *Neidefer v. Chastain*, 71 Ind. 363; *Mescall v. Tully*, 91 Ind. 96; *Telegraph Co. v. Reed*, 96 Ind. 195, (*vide* authorities cited page 198;) *Cottrell v. Insurance Co.*, 97 Ind. 311; *City of Logansport v. Uhl*, 99 Ind. 531. A plea of justification proceeds, and can only rightfully proceed, on the theory that all the material averments of the complaint are admitted, and this is the theory of the answer before us, and it would therefore have been error to instruct the jury that it controverted one of the substantive and material averments of the complaint. What we have said proves that the court below did not err in instructing that the answer admitted that the appellee was in the employment of the Encaustic Tile Company, and that he was discharged from it. It is true that mere allegations of value are not admitted by a failure to controvert them, but allegations of material facts are, and the employment and discharge of the appellee were material facts.

The third instruction given by the court reads thus: "The answer, among other things, charges and says that the plaintiff went into the shop where the dies were while the defendant's foreman was absent from the shop, and, without the knowledge or consent of the defendant, or his foreman, took and carried said dies away from the shop and custody of the defendant. On this point, I instruct you that if the plaintiff called or sent for the dies, and if he or the person whom he sent found at the defendant's shop any one there in charge of the shop who delivered the goods or dies to the plaintiff, or to any one sent by him for the dies, the law will presume that, as between the public and the defendant, the person so delivering the dies had authority to deliver the dies, whether as between him and the defendant he had authority or not; and if the plaintiff simply went for or sent after the dies, and got them from a person so in charge of the defendant's shop, the plaintiff did not get the dies away without the knowledge of the defendant, within the meaning of the law, even though both the defendant and his regular foreman were absent from the shop at the time the dies were taken away. But if the plaintiff watched his chances and availed himself of an opportunity to go for or send after the dies while the foreman was absent, for the

purpose of getting possession without first paying for the dies, then that portion of the letter is proved true. On the other hand, if the plaintiff did not so watch his chances to get the dies away, but took the dies away with the consent of anyone in charge of the shop, then in such case the defendant has failed to prove his letter true in that particular, even though the regular foreman was absent at the time the dies were taken away." We perceive no substantial error in this instruction, although it is not very well drawn.

If the principal holds out an agent or servant as possessing authority to control a shop or place of business, and a third person acts upon the faith of the appearances so created, the principal may, in such a case as this, be bound by the acts of the apparent agent within the scope of his ostensible authority, although, as between the agent and his employer, no such authority in fact existed. It would, it is very clear, be unjust to impute sinister motives to a third person who had obtained an article from a person in charge of a shop without deceiving such person by false statements. We think it was proper to instruct the jury that it could not be inferred from the fact that appellee got the dies from the agent in charge of the appellant's shop that he "had watched his chances," in the sense conveyed by that phrase as used in appellant's letter. Counsel are in error in asserting that the instruction assumes to inform the jury who appellant's agent or foreman was. It does not assert that any particular person was or was not his agent or foreman, but simply asserts the general principle that placing a person in charge of a shop constituted such a person, as to third persons, an agent for the performance of such duties as pertained to the authority of one who in fact was rightfully in charge of the shop. It left it to the jury to decide whether the person from whom the dies were obtained was or was not the one in whose charge the shop was at the time they were obtained. If the appellant had desired specific directions given to the jury upon the subject of the effect of knowledge of private instructions given by the principal to the agent, he should have asked the court to specifically instruct upon that subject. We think the instruction before us is good as far as it assumes to go, and, under long-settled and often-declared rules, it must be sustained. *Insurance Co. v. Buchanan*, 100 Ind. 63. Counsel assume that the plea of justification was, so far as that branch of it is concerned, made out by evidence that appellee secured the dies from one who had no authority to deliver them, and this we regard as an undue assumption. The question is not whether the appellee got the dies from a person having no authority to deliver them, nor whether he got them without paying for them, for the language of the letter clearly imputes to him a corrupt and dishonest purpose, and it devolved upon the appellant to prove that this was the appellee's purpose. *Odger, Sland. & L.* 169. A written instrument is to be construed by the court, and not by the jury. It was for the court to instruct the jury as to whether the letter

was or was not libelous. *Gabe v. McGinnis*, 68 Ind. 538; *Young v. Clegg*, 93 Ind. 371, authorities cited page 374. It would therefore have been proper for the court to have even more explicitly instructed the jury than it did as to what was necessary for the appellant to prove in order to constitute a justification.

The second instruction asked by appellant is not correct, for it asks the court to say to the jury that it was their ex-

clusive province to determine from the evidence who, if any one, was authorized to deliver the dies to the plaintiff. As we have seen, the question of authority involved an element of law, and it would have been error to leave the whole question to the jury. It is evident that to give such an instruction would mislead the jury, and induce in their minds the belief that they were to decide the whole question. Judgment affirmed.

SMITH v. SATTERLEE et al.

(29 N. E. 225, 130 N. Y. 677.)

Court of Appeals of New York. Second Division. Dec. 23, 1891.

Appeal from supreme court, general term, third department.

Action by John H. Smith against John Satterlee and others to recover on an assignment of a claim for services rendered. Judgment for plaintiff. Defendants appeal. Reversed. For former reports, see 43 Hun, 638, mem.; 46 Hun, 681, mem.

T. C. Cronin, for appellants. Frank Cumesky, for respondent.

PARKER, J. The complaint alleged an indebtedness on the part of the defendant to one Lutz for services rendered, and his assignment of the demand to the plaintiff. The answer denied any indebtedness to Lutz, and averred that prior to the assignment of Lutz's alleged claim to the plaintiff he became indebted to the defendants in a sum exceeding the amount for which the plaintiff demanded judgment. It was not disputed on the trial that Lutz rendered the services for which plaintiff sought to recover, nor their value. But the defendant attempted to prove that Lutz was intrusted with a sum of money due one Minshull, then an engineer on Lutz's division; that Lutz converted the money to his own use, and thereafter the defendants were compelled to pay Minshull such amount. Whether Lutz did or did not receive and retain the money intended for Minshull was the only question in the case. The defendants' evidence tended to show a request by Lutz of the paymaster for Minshull's money; that it was properly counted, put in an envelope, and placed on the desk with the other pay envelopes, which were taken by Lutz to the employes on his division. Lutz denied having

received or asked for it. The defendant Satterlee testified that Lutz admitted to him that he had received the money, but had lost it, as he supposed, out of his overcoat pocket. And in further support of defendants' contention it was proven that Minshull did not receive his money at the time the other employes on the division received theirs, but that it was paid to him by the defendants about eight days later, and by check. The plaintiff, against defendants' objection and exception, put in evidence a letter written over a year after this action was commenced, of which the following is a copy: "63 Broadway, New York, April 16th, 1884. J. H. Smith, Esq.—Dear Sir: Yours of the 14th inst. is at hand, and contents noted. To save cost, and stop further litigation, we are willing to send you our check for fifty (\$50) dollars in full liquidation of your claim. Please let us hear from you. Yours, etc., John Satterlee & Co." The defendants then moved that it be stricken out, but the motion was denied, and the exceptions thus taken are assigned for error on this review, and must be sustained, because the letter does not contain an admission of a fact, but rather an offer of compromise, made for the purpose of procuring a settlement of a pending controversy. *Lawrence v. Hopkins*, 13 Johns. 288; *Marvin v. Richmond*, 3 Denio, 58; *Draper v. Hatfield*, 124 Mass. 53. We cannot agree with the learned judge at general term that the judgment should not be reversed because the admission of the letter could not have affected the result. It is not seen how this court can determine what effect it had on the mind of the referee, who admitted it as evidence, and then refused to strike it from the record. Presumably it was considered in connection with the other evidence, which induced a finding favorable to the plaintiff. The judgment should be reversed. All concur.

AKERS v. KIRK et al.

(18 S. E. 366, 91 Ga. 590.)

Supreme Court of Georgia. April 24, 1893.

PRINCIPAL AND AGENT—SCOPE OF AGENCY—EVIDENCE—ADMISSIONS—HARMLESS ERROR.

1. It was competent for the plaintiff to testify why it was that in the first instance he charged the account sued upon to the defendant's husband.

2. An agency to borrow money for the purpose of clearing off liens from defendant's property does not comprehend an agency to confer with the holder or claimant of one of the liens, and make to him declarations touching the agency, the payment of the debt, the agent's hopes or arrangements as to borrowing money, or the purpose for which it was wanted, no application for any loan being made to such holder or claimant.

3. A conversation between the parties shortly before the trial, in which the defendant made certain admissions, was not rendered inadmissible as evidence by being brought about by the plaintiff through a proposition of settlement, it not appearing that the defendant's admissions were made with any view to a compromise, nor that any terms of settlement were mentioned or discussed.

4. There being evidence tending to show that the defendant's father had authority from her to borrow money for the discharge of the debt sued for in this action, his declarations to persons to whom he applied for loans, as to the purpose for which the money was wanted, were admissible in evidence, the purpose so declared being within the scope and object of the authority, so far as the debt now in controversy is concerned.

5. There being no contest as to the ownership of the premises, it was immaterial who furnished the money to pay for them.

6. Recovery may be had upon evidence that the party sought to be charged was the concealed principal of a person who acted in his own name without disclosing his agency, though this fact be not alleged in the pleadings. If the objection was a good one to the evidence, it should have been presented and insisted upon when the evidence was offered, so that the declaration could be amended and made specific as to the mode in which the contract between the plaintiff and the defendant was created.

7. Where the verdict undoubtedly represents the natural equity and sound justice of the case, and there is enough legal evidence to support it, the admission of some illegal evidence in behalf of the prevailing party will not render a new trial indispensable. Both the trial court and the reviewing court being satisfied, the verdict must stand.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Action by Thomas Kirk & Co. against Ella Akers. There was a verdict for plaintiffs, and a new trial denied. Defendant brings error. Affirmed.

The following is the official report:

Kirk & Co. sued Mrs. Akers upon an account, and also to foreclose a lien as contractors and material men for work done on and material furnished for the repairing and building of a certain house belonging to Mrs. Akers. The petition alleged that the lien was filed within 30 days after the work was completed and the material furnished; and that the suit was brought within less than 12 months from the time the work was done and material furnished, and also within 12 months from the time the debt became

due. The account attached to the declaration ran from July 23d to November 10th, but the year was not stated. The lien was recorded December 28, 1889. Defendant pleaded "not indebted;" that she made no contract with plaintiffs; that they did not file their lien within the time allowed by law and alleged in the declaration; and that they took personal security for their debt. Plaintiffs obtained a verdict, and defendant's motion for a new trial was overruled, to which she excepts. Her motion contained the general grounds that the verdict was contrary to law, evidence, etc.; also that the court refused to nonsuit plaintiffs on motion of defendant; that no case was made out against her, but against her husband, G. W. Akers, for which she was not shown to be responsible, which refusal to nonsuit was error. Error in allowing plaintiff, over defendant's objection, to testify: "We charged the account to G. W. Akers, because we supposed he owned the house, and the house was good for it." Defendant objected, because the lot was not responsible for the improvements, unless the owner procured the improvements, or subsequently ratified them. Because the court permitted plaintiff to testify: "I have had a conversation with her (Mrs. Akers) father since the work was done, in reference to Mrs. Akers paying the debt." Defendant objected on grounds of irrelevancy, and that her father could not bind her. Also because the court permitted plaintiff to testify: "Her father, as near as I can remember, came into my store a month or two after the lien was filed, and he stated to me that he hoped to settle this account in a very short time. He was making arrangements, I think, with Mrs. Healy to borrow money; and he hoped it would be all satisfactory. and in a very short time he would pay the account." Defendant objected because the court permitted plaintiff to testify: "He [T. J. Shepherd, defendant's father] wanted it [the money he was trying to borrow] to pay us for the work done on the house." Defendant objected on the ground that the testimony was irrelevant, and, further, that the promise, if any, on Mrs. Akers' part to pay G. W. Akers' debt should be in writing. Because on cross-examination of plaintiff he testified: "This morning Mrs. Akers and her father were sitting together, and he went out, and I went in and took a seat by her, and said 'could not this in some way be settled,—this case be settled,—and then this other conversation occurred,' meaning her admission testified to previously by plaintiffs, to wit, 'Mrs. Akers said that her father was trying to borrow the money to pay the debt off.'" When plaintiff so testified, defendant moved to exclude the conversation already testified to by plaintiff, and set out above, on the ground that whatever occurred or was admitted in said conversation could not be received against defendant on this trial as

it (the conversation) was looking to a compromise. Because the court admitted the recorded lien. Defendant objected on the grounds that the lien offered was recorded about 60 days after the last item sued on, and the petition set up that the lien claimed was recorded within 30 days of the last item, and that the allegata and probata did not agree; that the substantial part of the material sued for, to wit, the bills of August 13th and July 23d, was furnished over 90 days prior to the record of the lien offered; and that no connection was shown between the items of August 13th and July 23d, and the remaining material or items. Because the court permitted a witness, J. A. Scott, to testify: "I think he [T. J. Shepherd] wanted to pay certain debts with it. He wanted to borrow it for his daughter." Defendant objected on the grounds that there was nothing binding on Mrs. Akers in this testimony and that it was irrelevant. Because the court permitted Scott to testify: "Mr. Shepherd stated that he wanted to remove the liens that were on the property; that was what he wanted with the money." Defendant objected on the grounds that no connection was shown with Mrs. Akers, and that it was irrelevant. Because the court refused to permit defendant to show who furnished the consideration for the lot sought to be subjected to the lien of plaintiffs. As plaintiffs set up that Mrs. Akers and Mr. Akers were concealing an agency, this evidence was proper. Because the court permitted plaintiffs, in rebuttal, to prove by a number of witnesses the length of time Mrs. Akers was around the improvements, and the extent to which she exercised supervision. The error alleged was that plaintiffs had gone into all this kind of evidence in making out their case, and it was not legally or properly in rebuttal. Because petitioner alleged a contract and debt with Mrs. Akers, but the evidence only tended to establish a concealed principal, which was not alleged. Because the allegations of the petition and the evidence introduced thereunder do not agree.

So far as material, the evidence for plaintiff was: The materials mentioned in the account went into the house, which belonged to Mrs. Akers. At the time plaintiffs were making the improvements they thought the house belonged to Akers. Akers came to them, and got them to do the work, and they charged the account to him, because they supposed he owned the house, and the house was good for it. They completed the job, and have never been paid for it. Since the work was done, plaintiff Kirk had a conversation with Mrs. Akers' father, Shepherd, in reference to Mrs. Akers paying the debt. This was a month or so after the lien was filed. Her father came into the store, and stated that he hoped to settle the account in a very short time. He was making arrangements, Kirk thought, with Mrs. Healy

to borrow money, and hoped it would be all satisfactory, and in a very short time he would pay the account. Kirk did not think he stated whom he was trying to borrow the money for, only that he wanted to pay off the debt. Did not think he mentioned his daughter's name. He said he wanted it to pay plaintiffs for the work done on the house. Kirk had a conversation with Mrs. Akers in reference to that conversation with her father, and she said that her father was trying to borrow the money for her to pay off what she owed plaintiffs. When the goods were sold, Akers belonged to a firm which stood well, and plaintiffs were perfectly willing to sell goods to Akers, and never asked Mrs. Akers whether he owned the lot or not, nor inquired of any person in whom was the title to the lot, supposing, of course, that the house would be good for the improvements. They gave the credit to Akers and the lot and house combined, supposing he owned the house, and that the house was good for it. Did not see Mrs. Akers at all in the transaction. There are one or two articles in the account charged to Mrs. Akers,—part of a gas fixture, one or two of the small articles she might have purchased. The goods were not sold on the credit of Mrs. Akers, and she did not enter into the computation at all. Plaintiffs afterwards claimed the money from her, because they found out she owned the lot and house. The last item of the account went on the house. The morning of the trial Mrs. Akers and her father were sitting together, and he went out, and Kirk took a seat by her, and said in some way this case can be settled, and then the conversation with her occurred. Kirk thought if they could arrange it without going to a trial he preferred to do so,—meant it should not go to trial if she could pay up, and not have a trial. He did not know, of course, whether she would or not. Had no idea of compromise at all. She told him that her father had been trying to borrow the money to pay this debt, but she did not know why he did not succeed. There was no written contract to furnish the material, nor was there a contract with anybody, except a verbal one of Akers. Mr. Akers came and made the trade to get a stove from plaintiffs, and Mrs. Akers paid for it the following June. Akers left Georgia some time in December, 1889, or January, 1890. Kirk thought he saw Mrs. Akers down at the house, and that she might have been down in the store, but was not certain that she was in the store. Scott testified that Shepherd wanted to borrow some money on the property from Healy for Shepherd's daughter to pay certain debts with it, saying he wanted to remove the liens that were on the property; and Shepherd put into Scott's hands deeds to the lot in question for examination. Shepherd also tried to borrow of Wellhouse money on the property, to pay off the balance due on it,

and left a deed at Wellhouse's. Shepherd stated to Wellhouse that he wanted to borrow the money for his daughter. The daughter herself never applied to Wellhouse for a loan. There was evidence also that Mrs. Akers was at the house during part of the time that the work was being done; saw it done, and directed some changes to be made.

For the defendant there was testimony that she was absent from Atlanta during the time the improvements were being made, and when she returned it was all complete, and she directed no changes. She did not agree with anybody to make the improvements, and knew nothing about them. She did not make anybody her agents to have the improvements made. Her husband was not her agent, and she never had any conversation with him in which he said he was going to act as her agent, or anything of that kind. She had no notice of any purchases to be made, knew nothing about building houses, did not employ any workmen to assist in the work, and bought no material. First saw Kirk the morning of the trial, and did not remember ever purchasing anything from him. Did not buy the stove, but did pay for it; but never gave any promise to pay for any other part of the debt. In the conversation with Kirk the morning of the trial he asked her if there was any way the matter could be settled. She told him she did not know, as she knew nothing of it in any way, having been absent from the city. She could not tell anything about it. She told him she believed she had heard something of it, but did not know anything about it, and could not tell him anything more. She did not say anything about her father. His name was not mentioned. Her father was never appointed by her as her agent in any capacity, and she had no knowledge of any transactions he may have had. She has one or two gentlemen in Atlanta who attend to the rents of the place. Her father looks after the business sometimes. Work had just begun on the house before she went away. She did not know they were going to rebuild the house and enlarge it. She had not talked it over with her husband. Some time afterwards,—a good while,—she heard him speak of it, but did not know for certain it was going to be done. Did not know they were going to improve the house. Knew they had commenced it before she left, but did not know it was going to be done. Did not talk to her husband in reference to what was going to be done to the house. Asked no questions as to what was going to be done. Has had her deed to the land in her hands a long time,—longer than six months. Does not remember when she gave it to her father, nor how long it was after the suit was brought. Her father attended to some of that business of borrowing money for her. He was in Atlanta, looking after her business for her. "In this mat-

ter, sometimes,—I suppose so— As I was not here, I don't know anything about it. I don't remember whether I turned over my deed to my father, and told him to do the best he could with it, or not." Defendant is using the property since the improvements have been put upon it, and her husband has nothing to do with it, having left Georgia some time ago. "I don't know what I gave father the deed for. I guess he— Nothing." "Don't know whether I let him have it to come to Atlanta and negotiate a loan to pay off this indebtedness on my property or not. Father sorter oversees my property sometimes. Since my husband left, some of the time father has been in charge of my affairs, and I suppose he is here now looking after this suit." "There has been several thousand dollars of improvements put upon the house, and I have not paid one dollar for it." Shepherd testified that Akers, in a letter, told him he (Akers) owed some parties for material furnished and labor done in repairing or remodeling the house, and would like to have Shepherd assist Mrs. Akers in trying to get some money to pay off the indebtedness, suggesting that he thought Shepherd could get some money from Healy, Wellhouse, or others; that he thought, with Shepherd's assistance, he could borrow the money. Shepherd came to Atlanta for that purpose, and saw several parties with a view of getting the money, but was informed that the claims against the property amounted to so much that "we" abandoned the idea. Mrs. Akers did not do anything. Witness talked with her, advised with her. She did not want to incur the property with a mortgage, and no agreement was ever reached from her to mortgage, that witness ever knew of. They were considering the propriety of the thing when witness went to try to get the money to relieve the house of a debt which he believed Akers owed. Witness did not recognize that Mrs. Akers owed anything. The debts were against Akers. Mrs. Akers never constituted witness as her agent to negotiate. They advised together in reference to borrowing this money, and witness attempted to borrow it,—was attempting to borrow it upon her property; that is what they were considering. The object was to take the liens off the property. Witness does not know what facts constitute an agency. Mrs. Akers wanted the parties paid for the work done on the building, but is not herself able to do it. She owns the property, with a 27-room house upon it, etc.

Mayson & Hill, for plaintiff in error. W. J. Albert, for defendants in error.

BLECKLEY, C. J. The headnotes, together with the official report of the facts, will render the rulings made in this case sufficiently intelligible. There can be no doubt that the verdict of the jury repre-

sents the natural equity and sound justice of the case. The legal ground on which the verdict rests is that Mrs. Akers was the concealed principal of her husband; and that, although the credit was originally given to the latter by Kirk & Co., this was done in ignorance of the agency and of the true ownership of the property. There was enough legal evidence that such was the real truth of the case to uphold the verdict. That some illegal evidence was admitted does not render a new trial indispensable. To every lover of justice the verdict already found is more satisfactory than would be one of an opposite nature. It is impossible not to feel that, as Mrs. Akers, not her husband, obtained the benefit, she or her property ought to answer for it, rather

than Kirk & Co. should lose their money. Where all the consideration of a debt reaches a wife as an accession to her separate estate, and she retains and enjoys it, only slight evidence of the husband's agency in contracting the debt is required to charge her. We have examined many adjudications upon somewhat similar cases, but it is needless to cite them; for, while some of them would make for us, they are balanced by others of an opposite tendency. We prefer to rest the case on principle and its own facts. Both the trial court and the reviewing court are content with the verdict. This being so, we decline to order a new trial for slight errors immaterial to the result on the actual merits of the controversy. Judgment affirmed.

HOPT v. PEOPLE OF THE TERRITORY OF UTAH.

(4 Sup. Ct. 202, 110 U. S. 574.)

Supreme Court of the United States. March 3, 1884.

In error to the supreme court of the territory of Utah.

Thos. J. Marshall, for plaintiff in error.
Asst. Atty. Gen. Maury, for defendant in error.

HARLAN, J. The plaintiff in error and one Emerson were jointly indicted in a court of Utah for the murder, in the first degree, of John F. Turner. Each defendant demanded a separate trial, and pleaded not guilty. Hopt, being found guilty, was sentenced to suffer death. The judgment was affirmed by the supreme court of the territory. But, upon writ of error in this court, that judgment was reversed, and the case remanded, with instructions to order a new trial. 104 U. S. 631. Upon the next trial, the defendant being found guilty, was again sentenced to suffer death. That judgment was affirmed by the supreme court of the territory. We are now required to determine whether the court of original jurisdiction in its conduct of the last trial committed any error to the prejudice of the substantial rights of the defendant.

1. The validity of the judgment is questioned upon the ground that a part of the proceedings in the trial court were conducted in the absence of the defendant. The Criminal Code of Procedure of Utah, § 218, provides that "if the indictment is for a felony the defendant must be personally present at the trial; but if for a misdemeanor the trial may be had in the absence of the defendant; if, however, his presence is necessary for the purpose of identification, the court may, upon application of the prosecuting attorney, by an order or warrant, require the personal attendance of the defendant at the trial." The same Code provides that a juror may be challenged by either party for actual bias; that is, "for the existence of a state of mind which leads to a just inference in reference to the case that he will not act with entire impartiality." Sections 239, 241. Such a challenge, if the facts be denied, must be tried by three impartial triers, not on the jury panel, and appointed by the court. Section 246. The juror so challenged "may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry." Section 249. "Other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues govern the admission or exclusion of evidence on the trial of the challenge." Section 250. "On the trial of the challenge for actual bias, when the evidence is concluded, the court must instruct the triers that it is their duty

to find the challenge true, if in their opinion the evidence warrants the conclusion that the juror has such a bias against the party challenging him as to render him not impartial, and that if from the evidence they believe him free from such bias they must find the challenge not true; that a hypothetical opinion on hearsay or information supposed to be true is of itself no evidence of bias sufficient to disqualify a juror. The court can give no other instruction." Section 252. "The triers must thereupon find the challenge either true or not true, and their decision is final. If they find it true the juror must be excluded." Section 253.

It appears that six jurors were separately challenged by the defendant for actual bias. The grounds of challenge in each case were denied by the district attorney. For each juror triers were appointed, who, being duly sworn, were, "before proceeding to try the challenge," instructed as required by section 252 of the Criminal Code; after which, in each case, the triers took the juror from the court-room into a different room and tried the grounds of challenge out of the presence as well of the court as of the defendant and his counsel. Their findings were returned into court, and the challenge, being found not true, the jurors so challenged resumed their seats among those summoned to try the case. Of the six challenged for actual bias, four were subsequently challenged by the defendant peremptorily. The other two were sworn as trial jurors, one of them, however, after the defendant had exhausted all his peremptory challenges. No objection was made to the triers leaving the court-room, nor was any exception taken thereto during the trial. The jurors proposed were examined by the triers, without any testimony being offered or produced, either by the prosecution or the defense.

It is insisted, in behalf of the defendant, that the action of the court in permitting the trial in his absence of these challenges of jurors was so irregular as to vitiate all the subsequent proceedings. This point is well taken. The Criminal Code of Utah does not authorize the trial by triers of grounds of challenges to be had apart from the court, and in the absence of the defendant. The specific provision made for the examination of witnesses "on either side," subject to the rules of evidence applicable to the trial of other issues, shows that the prosecuting attorney and the defendant were entitled of right to be present during the examination by the triers. It certainly was not contemplated that witnesses should be sent or brought before the triers without the party producing them having the privilege, under the supervision of the court, of propounding such questions as would elicit the necessary facts, or without an opportunity to the opposite side for cross-examination. These views find some support in the further provision making it the duty of the court "when

the evidence is concluded," and before the triers make a finding, to instruct them as to their duties. In the case before us the instructions to the triers were given before the latter proceeded with the trial of the challenges. But all doubt upon the subject is removed by the express requirement, not that the defendant may, but, where the indictment is for a felony, must be, "personally present at the trial." The argument in behalf of the government is that the trial of the indictment began after, and not before, the jury was sworn; consequently that the defendant's personal presence was not required at an earlier stage of the proceedings. Some warrant, it is supposed by counsel, is found for this position in decisions construing particular statutes in which the word "trial" is used. Without stopping to distinguish those cases from the one before us, or to examine the grounds upon which they are placed, it is sufficient to say that the purpose of the foregoing provisions of the Utah Criminal Code is, in prosecutions for felonies, to prevent any steps being taken in the absence of the accused, and after the case is called for trial, which involves his substantial rights. The requirement is not that he must be personally present at the trial by the jury, but "at the trial." The Code, we have seen, prescribes grounds for challenge by either party of jurors proposed. And provision is expressly made for the "trial" of such challenges, some by the court, others by triers. The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins.

But it is said that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the court-room, or to their trial of the several challenges in his absence. We are of opinion that it was not within the power of the accused or his counsel to dispense with statutory requirements as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, "cannot legally be disposed of or destroyed by any individual, neither by the person himself,

nor by any other of his fellow creatures merely upon their own authority." 1 Bl. Comm. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with, or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Comm. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution. For these reasons we are of opinion that it was error, which vitiated the verdict and judgment, to permit the trial of the challenges to take place in the absence of the accused.

2. Another assignment of error relates to the action of the court in permitting the surgeon—who had made a post mortem examination of the body of a corpse which was claimed by the prosecution to be that of John F. Turner—to state that one Fowler identified the body to him. The surgeon testified that the body examined by him was on the platform at the railroad depot in Salt Lake City, in a wooden case and coffin. The father of the deceased testified that he did not communicate personally with the surgeon, nor see that his son's body was delivered to him; that he left it at the railroad depot in Salt Lake City, in a wooden coffin, inclosed in a box; and the fact that the body of the deceased was originally placed in such a coffin was proved by a witness who put it in the coffin. And yet there was testimony showing that there was a body in the same depot, at or about the time referred to by the surgeon, which, having been placed in a metallic case covered by a wooden box, had been shipped from Echo, by rail to Salt Lake City; also that it showed injuries "generally similar" to those described by the surgeon. Were there two bodies of deceased persons, at the same depot, about the same time, one "in a wood coffin inclosed in a box," and the other, "in a metallic case covered by a wooden box?" There would be some ground to so contend did not the bill of exceptions, in its reference to the body shipped from Echo in a metallic case, imply that there was testimony showing it to be the one that "had been identified as the body of the deceased, John

F. Turner." The confusion upon the subject arises from the failure to state that the body which the father of the deceased left at the railroad depot was the same as that shipped from Echo to Salt Lake City. It was, perhaps, to this part of the case the court referred when, in the charge to the jury, it said that the prosecution "has introduced a vast amount of circumstantial evidence." Be this as it may, it was a material question before the jury whether the body examined by the surgeon was the same one that the father of the deceased had left at the depot, and therefore the body of the person for whose murder the defendant and Emerson were indicted. If it was not, then all that he said was immaterial. If it was, (the evidence otherwise connecting defendant with the death of John F. Turner,) the statements of that witness as to the condition of the corpse, the nature of the injuries—whether necessarily fatal or not—observable upon the body examined by him, and how the blows, apparent upon inspection of it, were probably inflicted, became of great consequence in their bearing upon the guilt or innocence of the defendant of the crime of murder.

No proper foundation was laid for the question propounded to the surgeon as to who pointed out and identified to him the body he examined as that of John F. Turner. He had previously stated that he did not personally know the deceased, and did not recognize the body to be his; he did not know that it was the body which the father of deceased desired him to examine; consequently his answer could only place before the jury the statement of some one not under oath, and who, being absent, could not be subjected to the ordeal of a cross-examination. The question plainly called for hearsay evidence, which, in its legal sense, "denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests, also, in part, on the veracity and competency of some other person." 1 Greenl. Ev. § 99; 1 Phil. Ev. 169. The general rule, subject to certain well-established exceptions as old as the rule itself,—applicable in civil cases, and therefore to be rigidly enforced where life or liberty are at stake,—was stated in *Mima Queen v. Hepburn*, 7 Cranch, 295, to be, "that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge." "That this species of testimony," the court further said, speaking by Chief Justice Marshall, "supposed some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is inadmissible." The specific fact to be established by proof of what some one else said

to the surgeon as to the identity of the body submitted to his examination was that it was the body of John F. Turner. What Fowler—who was not even shown to have been placed in charge of the body, nor commissioned to deliver it to the surgeon, nor to be acquainted with the deceased—said, in the absence of the prisoner, as to the identity of the body, was plainly hearsay evidence, within the rule recognized in all the adjudged cases. As such it should, upon the showing made, have been excluded.

3. The next assignment of error relates to that portion of the charge which represents the court as saying: "That an atrocious and dastardly murder has been committed by some person is apparent, but in your deliberations you should be careful not to be influenced by any feeling." By the statutes of Utah, "murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, or premeditated killing, or committed in the perpetration of or attempt to perpetrate, any arson, rape, burglary, or robbery, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being other than him who is killed, or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind regardless of human life, is murder in the first degree; and any other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree." Comp. Laws Utah 1873, p. 585. The punishment of murder in the first degree is death, or, upon the recommendation of the jury, imprisonment at hard labor in the penitentiary at the discretion of the court, while the punishment for murder in the second degree is imprisonment at hard labor in the penitentiary for not less than five nor more than fifteen years. Id. 586. In view of these statutory provisions, to which the attention of the jury was called, it is clear that the observation by the court, that "an atrocious and dastardly murder has been committed by some person," was naturally regarded by them as an instruction that the offense, by whomsoever committed, was murder in the first degree; whereas it was for the jury, having been informed as to what was murder by the laws of Utah, to say whether the facts made a case of murder in the first degree or murder in the second degree. It was competent for the judge, under the statutes of Utah, to state to the jury "all matters of law necessary for their information," and, consequently, to inform them what those statutes defined as murder in the first degree and murder in the second degree. Laws Utah 1878, p. 120; Code Cr. Proc. §§ 283, 284. But it is expressly declared by the Code of Criminal Procedure that while he may "state the testimony and declare the law" he "must not charge the jury in respect to matters of fact." Section 257. The error committed was not cured by the previous ob-

servation of the judge, that by the laws of Utah the jury are "the sole judges of the credibility of the witnesses and of the weight of the evidence and of the facts." It is rather more correct to say that the effect of that observation was destroyed by the statement at the conclusion of the charge that the murder, by whomsoever committed, was an atrocious and dastardly one, and therefore, as the jury might infer, in view of the language of the statute, was murder in the first degree. The prisoner had the right to the judgment of the jury upon the facts, uninfluenced by any direction from the court as to the weight of evidence. For the reasons stated the judgment of the supreme court of the territory must be reversed, and the case remanded, with directions that the verdict and judgment be set aside and a new trial ordered.

The assignments of error, however, present other questions of importance which, as they are likely to arise upon another trial, we deem proper to examine.

4. The first of these questions relates to the action of the court in permitting Carr—called as a witness for the defense—to give in evidence a confession of the prisoner. That confession tended to implicate the accused in the crime charged. The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forbore to mark with absolute precision the limits of admission and exclusion. It is unnecessary in this case that we should lay down any general rule on the subject; for we are satisfied that the action of the trial court can be sustained upon grounds which, according to the weight of authority, are sufficient to admit confessions made by the accused to one in authority. It appears that the defendant was arrested at the railroad depot in Cheyenne, Wyoming, by the witness Carr, who is a detective, on the charge made in the indictment. The father of the deceased, present at the time, was much excited, and may have made a motion to draw a revolver on the defendant, but of that fact the witness did not speak positively. The witness may have prevented him from drawing a weapon, and thinks he told him to do nothing rash. At the arrest a large crowd gathered around the defendant; Carr hurried him off to jail, sending with him a policeman, while he remained behind, out of the hearing of the policeman and the defendant. In two or three minutes he joined them, and immediately the accused commenced making a confession. What conversation, if any, occurred between the latter and the policeman during the brief period of two or three minutes preceding the confession was not known to the witness. So far as witness knew, the bill of

exceptions states "the confession was voluntary and uninfluenced by hopes of reward or fear of punishment; he held out no inducement, and did not know of any inducement being held out to defendant to confess." This was all the evidence showing or tending to show that the confession was voluntary or uninfluenced by hope of reward or fear of punishment.

While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke in *Regina v. Baldry*, 2 Denison, 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B., in *King v. Warickshall*, 1 Leach, 263, "is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers." Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession. 1 Greenl. Ev. § 215; 1 Archb. Cr. Pl. 125; 1 Phil. Ev. 533, 534; Starkie, Ev. 73. But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprive him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law. Tested by these conditions, there seems to have been no reason to exclude the confession of the accused; for the existence of any such inducements, threats, or promises seems to have been negatived by the statement of the circumstances under which it was made.

But it is contended that the court erred in not excluding this proof until the prosecution produced the policeman and proved that nothing was said or done by him, in the absence of Carr, which unduly influenced the making of the confession. The argument is that, possibly, the policeman offered such inducements, or made such threats or promises, that the prisoner, when joined by Carr, was not in a condition of mind to make a confession which the law would deem voluntary. This position, although

plausible, is not sustained by authority, nor consistent with sound reason. The circumstances narrated by the witness proved the confession to be voluntary, so far as anything was said or done by him on the immediate occasion. There was nothing disclosed which made it the duty of the court to require, as a condition precedent to the admission of the evidence, that the prosecution should call the policeman and show that he had not, when alone with the accused, unduly influenced him to make a confession.

In *Rex v. Clewes*, 4 Car. & P. 221; 3 Russ. Cr. (Sharsw. Ed.) 431, 432, the prosecution proposed to give in evidence a confession made by the accused before the coroner. It appearing that a magistrate had previously an interview with the prisoner, it was suggested that, as he may have been told by that officer that it was better to confess, the prosecution should call him. But the court said that while it would be fair in the prosecutors to call the magistrate, it would not compel them to do so; but if they did not, the prisoner might do so if he chose.

In *Rex v. Williams*, Roscoe, Cr. Ev. (7th Am. Ed.) 54, 3 Russ. Cr. (Sharsw. Ed.) 432, it appeared that a prisoner, being in the custody of two constables on a charge of arson, a third person went into the room. The prisoner immediately asked him to go into another room, as he wished to speak to him. They went into that room, and the prisoner made a statement to that person. It was contended that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess. But Taunton, J., after consulting with Littledale, J., said: "We do not think, according to the usual practice, that we ought to exclude the evidence, because a constable may have induced the prisoner to make the statement; otherwise he must in all cases call the magistrates or constables before whom or in whose custody the prisoner has been."

In *Rex v. Warner*, 3 Russ. Cr. (Sharsw. Ed.) 432, the prisoner, when before the committing magistrate, having been duly cautioned, made a confession, in which he alluded to one previously made to a constable. It was remarked by the court that, although it was not deemed necessary that a constable, in whose custody a prisoner had been, should be called in every case, yet, in view of the reference to him, he should be called. The constable being called, proved that he did not use any undue means to obtain a confession, but he disclosed the fact that he had received the prisoner from another constable, to whom the prisoner had made some statements. As it did not appear that any confession was made to the latter, and only appeared that a statement was made that might either be a confession, a denial, or an exculpation, the court would not require him to be called. S. C. Roscoe, Cr. Ev. (7th Am. Ed.) 54, 55.

Roscoe (page 554) states the rule to be that

"in order to induce the court to call another officer, in whose custody the prisoner has been, it must appear either that some inducement has been used by, or some express reference made to, such officer." Russell says: "For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the confession was made." Vol. 3, p. 431.

While a confession made to one authority should not go to the jury unless it appears to the court to have been voluntary, yet, as the plaintiff in error chose to let its admissibility rest upon the case made by the detective, without any intimation that it would be different if the policeman was examined, and since there was nothing in the circumstances suggesting collusion between the officers, we do not think the court was bound to exclude the confession upon the sole ground that the policeman was not introduced.

5. The last question relates to the action of the court in admitting, as a witness in behalf of the prosecution, Emerson, then serving out a sentence of confinement in the penitentiary for the crime of murder, and the judgment against whom had never been reversed. His testimony tended to implicate the defendant in the crime charged against him. Objection was made to his competency as a witness, but the objection was overruled. At the time the homicide was committed, and when the indictment was returned, it was provided by the criminal procedure act of Utah of 1878 that "the rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this act." And the civil practice act of that territory provided (section 374) that "all persons, without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding. Facts which, by the common law, would cause the exclusion of witnesses, may still be shown for the purpose of affecting their credibility." Comp. Laws Utah, 505. Further, (section 378,) that "persons against whom judgment has been rendered upon a conviction for felony, unless pardoned by the governor, or such judgment has been reversed on appeal, shall not be witnesses." On the ninth day of March, 1882, after the date of the alleged homicide, but prior to the trial of the case, an act was passed which repealed the section of the civil practice act last quoted. It is contended that such repeal, by which convicted felons were made competent witnesses in civil cases, did not make them competent in criminal cases; in other words, for such is the effect of the argument, those who were excluded as witnesses, under the civil practice act, at the time the criminal procedure act of 1878 was adopted, remained incompetent

in criminal cases, unless their incompetency, in such cases, was removed by some modification of the civil practice act expressly declared to have reference to criminal prosecutions. In this view we do not concur. It was, we think, intended by the criminal procedure act of 1878 to make the competency of witnesses in criminal actions and proceedings depend upon the inquiry whether they were, when called to testify, excluded by the rules determining their competency in civil actions. If competent in civil actions, when called, they were, for that reason, competent in criminal proceedings. The purpose was to have one rule on the subject applicable alike in civil and criminal proceedings.

But it is insisted that the act of 1882, so construed, would, as to this case, be an *ex post facto* law, within the meaning of the constitution of the United States, in that it permitted the crime charged to be established by witnesses whom the law, at the time the homicide was committed, made incompetent to testify in any case whatever. The provision of the constitution which prohibits the states from passing *ex post facto* laws was examined in *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. 443. The whole subject was there fully and carefully considered. The court, in view of the adjudged cases, as well as upon principle, held that a provision of the constitution of Missouri denying to the prisoner charged with murder in the first degree the benefit of the law as it was at the commission of the offense,—under which a conviction of murder in the second degree was an acquittal of murder in the first degree, even though such judgment of conviction was subsequently reversed,—was in conflict with the constitution of the United States. That decision proceeded upon the ground that the state constitution deprived the accused of a substantial right which the law gave him when the offense was committed, and therefore, in its application to that offense and its consequences, altered the situation of the party to his disadvantage. By the law as established when the offense was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas, by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried

and convicted of murder in the first degree, and subjected to the punishment of death. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offense was committed. But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed. The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged.

Judgment reversed.

BUBSTER v. STATE.

(50 N. W. 953, 33 Neb. 663.)

Supreme Court of Nebraska. Jan. 4, 1892.

Error to district court, Douglas county; Clarkson, Judge.

Prosecution against Herman Bubster for larceny. Verdict of guilty, and judgment thereon. Defendant brings error. Reversed.

John P. Davis and Davis & Stevens, for plaintiff in error. Geo. H. Hastings, Atty. Gen., for the State.

MAXWELL, J. The plaintiff in error was informed against in the district court of Douglas county for the larceny of a buggy of the value of \$75, and on the trial found guilty, and sentenced to imprisonment in the penitentiary for one year. The sole question in this court is the sufficiency of the evidence to sustain the verdict. The buggy, it seems, was found at a paint-shop in the city of Omaha, and it is claimed the plaintiff in error took the buggy there to be painted, and that it had been taken feloniously without the owner's consent. There are two serious objections to this verdict: First. The owner of the buggy, although apparently within reach of the process of the court, was not

called as a witness. Her son-in-law, who resides with her, testifies that he did not give his consent, and very freely testifies that his mother-in-law did not. She was within reach of the process of the court, and should have been called as a witness to prove her non-consent. The rule is very clearly stated in note 183, 1 Phil. Ev. (4th Am. Ed.) A conviction of larceny ought not to be permitted or sustained unless it appears that the property was taken without the consent of the owner; and the owner himself should be called, particularly in a case like that under consideration, when the acts complained of may be consistent with the utmost good faith. There is a failure of proof, therefore, on this point. Second. The chief of police of the city of Omaha was called as a witness, and on his direct examination he testifies in substance that the plaintiff in error confessed to him, and that he offered no inducements to secure such confession. On cross-examination, however, he in effect admits that he did hold out such inducements, and his testimony is clearly inadmissible, as also that of Mr. Cusick, the policeman. There is not sufficient evidence to support the verdict, and the judgment is reversed, and a new trial awarded. Judgment accordingly. The other judges concur.

LOWE v. STATE.

(7 South, 97, 88 Ala. 8.)

Supreme Court of Alabama. Jan. 7, 1890.

Appeal from criminal court, Jefferson county; S. E. GREENE, Judge.

Gilbert Lowe was indicted for the murder of John W. Meadows, and found guilty, and appeals.

S. M. & W. C. Meek, for appellant. *W. L. Martin*, Atty. Gen., for the State.

CLOPTON, J. The first matter complained of is the refusal of the court to exclude the entire confession of defendant on the ground that it was not shown to have been freely and voluntarily made. The necessities of the case do not call for a decision of the question whether or not the confession was voluntary. In his confession defendant described the kind of clothing which the deceased wore when killed, and the place where he was killed, and stated that the body was left in a sink covered with leaves, and also some keys, a watch-chain, a broken-handled knife, and a brown, soft hat. The court excluded all of the confession, except the statements describing the dress of deceased, the place where the killing occurred, and the manner in which the body was left.

A modification of the rule which excludes a confession not shown to be voluntary is, if information derived therefrom leads to the discovery of material facts, which go to prove the commission of the crime, so much of the confession as strictly relates to the facts discovered, and the facts themselves, will be received in testimony, though the confession may not be shown to have been voluntary, for the reason that the discovery of the facts corroborates the truth of the confession to that extent. *Banks v. State*, 84 Ala. 430, 4 South. Rep. 382; *Murphy v. State*, 63 Ala. 1. There is evidence, showing that the body of the deceased was found at the place where accused stated it was left, partially covered with leaves, as were also a broken-handled knife, watch-chain, keys, and a brown, soft hat, near the body. The record does not affirmatively disclose whether the body and other articles were discovered before the confession was made or afterwards, as a sequence of the information derived from the accused. But the bill of exceptions does not purport to set out all the evidence. In this state of the record, we must presume, if necessary to sustain the ruling of the criminal court, that they were discovered after the confession. It is true that the clothing which the defendant stated deceased wore was not discovered. He was stripped of apparel, except the underwear. The only identifying testimony as to the clothing is that the deceased wore such the last time he was seen before the killing. It may be that the statement of defendant as to the coat, vest, pantaloons and shoes of deceased do not come within the rule of admissibility. This question we do not decide. The motion was to exclude, and the

exception goes to the refusal of the court to exclude the entire confession. When general exceptions are made to evidence partly admissible and partly inadmissible, the court is not bound to separate the legal and illegal parts. The criminal court could have properly overruled the entire motion, a portion of the statements of defendant being admissible. No objection having been made separately and specially to the portion of the statement describing the dress of deceased, which may be of doubtful admissibility, and as the court could have properly, on the motion to exclude the entire confession; retained the whole of it in evidence, defendant cannot complain that the court failed to nicely separate the legal and illegal parts.

The court, having charged the jury, at the instance of defendant, that before they can convict of murder they must be satisfied that he has been proven guilty of the offense, "fully, clearly, conclusively, satisfactorily, and that to a moral certainty, and beyond all reasonable doubt," the prosecuting solicitor requested the court to instruct the jury that the terms used in the foregoing charge meant the same as that they must be convinced of his guilt "beyond a reasonable doubt." The charge given at the instance of the defendant was probably calculated, by the conjunctive use of cumulative words and expressions, to create upon the mind of the average juror the erroneous impression that a higher degree of proof is essential to conviction for murder than is meant by the phrase "beyond a reasonable doubt." The explanatory charge was proper, to prevent the jury from being misled. *McKleroy v. State*, 77 Ala. 95.

There is no error in the refusal of the court to charge the jury that if a witness has willfully testified falsely to any material fact the jury should disregard his evidence altogether. Of the weight and credibility of all oral proof, whether given for or against the accused, the jurors are the sole judges. They may disregard altogether the evidence of a witness who has willfully sworn falsely, or they may credit portions of his testimony, especially if corroborated by other witnesses, or by circumstances clearly proved. The court cannot, as matter of law, instruct them to disregard altogether the testimony of any witness. The charge would have invaded the province of the jury. *Moore v. State*, 68 Ala. 360; *Jordan v. State*, 81 Ala. 20, 1 South. Rep. 577.

It cannot be said that the trite expression, "it is better that ninety-nine guilty men should escape than that one innocent man should be punished," is an established maxim of the law. The law recognizes no such comparison of numbers. Its sole object is to punish the guilty, and that the innocent be acquitted. The tendency of such a charge, unexplained, is to mislead. We have heretofore ruled in several cases that it is not error to refuse similar charges. *Ward v. State*, 78 Ala. 441; *Carden v. State*, 84 Ala. 417, 4 South. Rep. 823.

Affirmed.

STATE v. CLIFFORD.

(53 N. W. 299, 86 Iowa, 550.)

Supreme Court of Iowa. Oct. 22, 1892.

Appeal from district court, Shelby county; Walter I. Smith, Judge.

Defendant was indicted for the crime of larceny from a building in the nighttime, and was convicted of simple larceny. He appeals.

Byers & Lockwood, for appellant. John Y. Stone, Atty. Gen., and Thos. A. Cheshire, for the State.

KINNE, J. 1. The defendant and one Fillmore were indicted for stealing from the barn of Axline & Smith, in the nighttime, 26 bushels of clover seed, of the value of \$125. The court permitted a witness named Cuppy to testify in rebuttal on part of the state as to statements made by the defendant in his examination before the grand jury. It appears that while the defendant was under arrest and in the county jail, charged with the commission of the very crime for which he was afterwards indicted and tried, the foreman of the grand jury, then in session, had the sheriff of the county bring defendant before said body, where he was examined under oath as to his supposed connection with the alleged larceny. It does not appear that the defendant was informed as to his rights, or of the effect of the answers he might give, or as to the fact as to whether or not such answers could afterwards be used against him. No minutes of his testimony were taken by the grand jury. We may properly assume that he testified under oath, without being informed as to his rights, or the effect of his testimony, or the possibility of its use against him thereafter. It is contended that his statements so made before the grand jury were not voluntary, and hence inadmissible against him upon the trial. The course of procedure pursued by the grand jury with reference to the examination of this witness was unprecedented, and, to our minds, wholly unjustifiable from any point of view. They had no right to compel the defendant, then in custody, and charged with the commission of the crime inquired about, to give testimony before them. To put him under oath, under such circumstances, without advising him of his rights, was attempting to take an unfair advantage of his situation, to his prejudice. A statement so procured could in no proper sense be said to be voluntarily made. A confession or statement, to have been voluntarily made, must proceed "from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause." "If made under oath by the party charged, upon a judicial inquiry as to the crime, it [the confession] is rejected, as not being voluntary." *People v. McMahon*, 15 N. Y. 395. The law

is well settled that when a person is compelled to answer questions under oath, put to him by a committing magistrate, touching his supposed connection with the crime then being investigated, and of which he stands accused, his statements are not admissible against him. 3 Am. & Eng. Enc. Law, p. 488; *Whart. Cr. Ev.* §§ 668, 669; *State v. Mathews*, 66 N. C. 106; *People v. McMahon*, 15 N. Y. 384; *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496. And it is said that, unless the defendant comprehended his rights fully, and is informed by the court or examining body that his refusal to answer the questions propounded to him could not prejudice his case, or be construed as an evidence of his guilt, any responsive confessions implicating him in the crime charged must be regarded as involuntary, and hence inadmissible. *Whart. Cr. Ev.* §§ 668, 669; *State v. Rorie*, 74 N. C. 148; 1 *Greenl. Ev.* §§ 225, 226, and notes. The same rule would apply as to examinations had, as in this case, before a grand jury. Some of the states by statute require magistrates conducting such examinations to admonish the prisoner as to the effect of his answer and his right to refuse to answer, but it is believed that the general rule of law is as above stated, even in the absence of such a statute.

Counsel for the state contend that the evidence was admissible, and cite *Code*, § 4285; *State v. Hayden*, 45 Iowa, 11; *State v. Row*, 81 Iowa, 138, 46 N. W. 872; and some Indiana cases. The statute referred to provides that a member of the grand jury may be compelled to disclose the testimony of a witness examined before such jury, to ascertain if it be consistent with that given by him before the court. It cannot be said that this statute had the effect of making the testimony given before the grand jury, under oath and involuntarily, by one at the time charged with the very crime then being inquired about, and who, when so examined, was under arrest therefor, competent on a trial of the party under indictment for such crime. Counsel have cited no case so holding, and we find none. We see no reason for holding that the legislature, in enacting the statute referred to, intended to abrogate the universal rule of law that involuntary admissions in confession of a defendant charged with a crime are inadmissible against him on a trial for such crime. The statute was, we think, not intended to cover such a case, and thereby permit a grand juror to give evidence of such involuntary confession, which no other person is permitted to testify to. If the defendant, when examined before the grand jury, had been advised as to his rights, and then given evidence, the rule might be different. In *State v. Briggs*, 68 Iowa, 424, 27 N. W. 358, it was held that a plea of guilty, entered by a defendant to a preliminary information, he not being informed as to his legal rights, was a voluntary admission of his guilt, and

admissible against him. No authorities are cited in support of this holding. In the case at bar the defendant was put under oath. He was taken before the grand jury, not of his own volition, but by the direction of the examining body, for the purpose of being interrogated as to his supposed connection with the crime with which he was accused. In the Briggs Case the magistrate afforded him an opportunity to plead guilty or not guilty. In the case at bar the proceedings as to defendant's being sworn and examined were of a compulsory character, no election being afforded him. For these and other reasons the holding in *State v. Briggs* does not apply. See, also, *State v. Carroll* (Iowa) 51 N. W. 1159.

2. It is claimed that the evidence does not warrant a verdict of guilty. In substance, the evidence shows that Axline & Smith, in January, 1892, had 13 sacks of clover seed stored in their barn; that about January 20, 1892, said seed was stolen by some one; that it was of the value of \$125; that one Clouser had worked for Axline & Smith, and, among others, knew where the seed was stored; that he visited Fillmore (who was jointly indicted with defendant) before the seed was taken; that the sacks which had contained the seed were found, after it had been stolen, at Hancock, Iowa; that about the time the seed was taken Fillmore hauled to Council Bluffs, and sold there, about 26 bushels of clover seed; that Clifford went with him to Council Bluffs, and on the way he ascertained from Fillmore that he had clover seed in the sacks in the wagon, and saw him hide the sacks under a culvert in the wagon road, where they were afterwards found. It appears also that defendant accompanied Fillmore back from Council Bluffs to Avoca. The reasons defendant gave for going to Council Bluffs with Fillmore were in part, at least, unsatisfactory. But there was no direct evidence in any way connecting defendant with the crime charged. So far as appears, he received no part of the money paid Fillmore for the seed. It does not appear that he was seen at or near the barn where the seed was stored. There is no showing that he in any manner exercised any control over the seed or the team and wagon

by means of which it was conveyed to Council Bluffs. Defendant seems to have been a passenger with Fillmore to Council Bluffs under suspicious circumstances, which, however, are explainable consistent with his innocence of the crime charged. The testimony does not point with reasonable certainty, even, to defendant's guilt. Stated most strongly against the defendant, it is a case of suspicion, not of guilt established. We are at a loss to understand on what the jury based a verdict of guilty, unless it was that defendant, in a few of his answers, evinced a disposition to be what is usually called a "smart" witness. The verdict is without foundation to support it, and cannot stand.

3. It clearly appears from this record that the trial court had grave doubts as to defendant's guilt. When the court came to impose sentence on the defendant he said to him: "Mr. Clifford, it is contrary to my usual practice to make any comments when passing judgment in cases of this kind, but in this case I am constrained to say to you that you have been found guilty of the crime of larceny upon very slight evidence. I firmly believe that, if you had conducted yourself upon the witness stand as you should have done, no jury could have been found that would have returned a verdict of guilty upon such slight and trivial evidence." The conduct which the court speaks of was the manner of defendant on the stand, especially in his answers to certain questions relating to his reasons for going to Council Bluffs. These answers, which we need not set out here, indicated a want of moral character and rectitude in other directions. We think this was clearly a case where the trial court should have exercised its right to set aside the verdict. If a man is to be committed to the penitentiary for a crime, his guilt of which is established, if at all, by circumstantial evidence, such evidence should not only point him out as guilty, but be inconsistent with any reasonable theory as to his innocence. This the testimony in this case fell far short of doing. It will not do to let a verdict stand which deprives a man of his liberty, when it is based upon mere suspicion. The judgment of the district court is reversed.

PEOPLE v. CHAPLEAU.

(24 N. E. 469, 121 N. Y. 266.)

Court of Appeals of New York. April 29, 1890.

Appeal from court of oyer and terminer, Clinton county.

James Averill, for appellant. *Samuel L. Wheeler*, Dist. Atty., for respondent.

GRAY, J. The defendant was indicted for the crime of murder in the first degree for the killing of Irwin E. Tabor, and he was tried at a court of oyer and terminer held in and for Clinton county. The jury rendered a verdict in accordance with the charge in the indictment, and sentence of death was passed. From the judgment of conviction the defendant has appealed to this court, and his counsel assigns as grounds for sustaining his appeal the admission of improper and incompetent evidence, and the insufficiency of the evidence to convict for murder in the first degree. We have carefully read and considered the proofs in this record relied on to establish the defendant's guilt. We are satisfied that no injustice has been committed against him in the trial upon the indictment, and that the verdict could not have been otherwise rendered by sensible men. The occurrence of the killing was in this wise, as it is made to appear from the whole record: The defendant lived near the village of Plattsburgh, and was employed in the hauling of wood. About 4 o'clock on Monday afternoon, January 28, 1889, he and two other teamsters were returning home with their sleds, when, at a point in the road, they met the deceased driving himself in a sleigh. He turned out with a nod of recognition, and passed the three teams, of which the defendant's led. After passing, defendant attacked the deceased, struck him upon the head with a wooden stake, and knocked him out of his sleigh upon the road, where he shortly after expired from his injuries. This attack was testified to by one of the teamsters, Nelson Brown; the other one having died since the occurrence. Brown's attention was attracted by hearing the defendant address the deceased with loud and violent language. He looked behind, and saw the deceased stricken down from his seat, and fall upon the road. Of other witnesses, evidence was had of his loud and abusive exclamations; of his hastening from the rear of the teams where the body lay, with a stake in his hand, to catch up with his team, which had gone on ahead; and of the finding of the body upon the road, with the head battered almost beyond recognition, with the blanket and buffalo robe still wrapped about his person, and with a piece of the driving reins tightly grasped in his mittened hands. Evidence was also adduced of the defendant's saying to the officer who had arrested him the same evening, and was conducting him to Plattsburgh, "I do not think that Mr. Tabor will poison any more cows." This remark had reference to the prisoner's previous statements, testified to by witnesses, that the deceased had poisoned his cow. The utterance of threats by the defendant against the life of the deceased was also proved. One neighbor testified that the de-

fendant had threatened to shoot Tabor, remarking that he had injured his cow. Another testified that the night before, when the defendant was at his house, he had narrated a conversation had with Tabor on the road. He told witness that he had called Tabor "cow doctor, Vermonter;" and Tabor had told him to "shut up his head;" and he had answered back, "I will not shut up my head, but I am going to shut up your head for you, and when I shut it up it will stay shut." When the wife of the witness, hearing this, said, "If you was to do that to Mr. Tabor, you would be apt to get a rope around your neck," he replied: "Mrs. Brown, people will be so glad to get that long body destroyed, people will not hurt me much. Any way, they do not hang any more. If I was going to be killed, I would be killed that new way." The next day after the occurrence, when the coroner held his inquest, the foreman of his jury, who was also the sheriff, stated that Chapleau, the prisoner, wanted to come before the jury and make a statement. He was brought in, and what he then said was reduced to writing by the coroner. That official, being examined as a witness upon the trial, gave in evidence the statements of the defendant as taken down by him at the time of the inquest. He testified, from his minutes, that he informed the prisoner, before the jury, as to his right to depose or not, as he thought fit, and that the deposition might be used against him thereafter; that the prisoner elected of his own free will to be sworn, and asked to be allowed to testify. The prisoner's story was then given as thus stated, in which he represented the occurrence as provoked by deceased. He stated that the deceased referred to his remarks about poisoning cows, and jumped from his cutter upon the sled, with something in his hand; whereupon he (the prisoner) hit him with the stake. He also stated that the deceased had threatened to shoot him, and that they had had disputes concerning this alleged poisoning of his cows by the deceased. As against the people's evidence the prisoner adduced some evidence of his good character. The charge of the trial judge was very fair, and was not excepted to; nor was it really exceptionable in its instructions to the jury. But the appellant's counsel relies and insists upon certain features of the case, as it was developed upon the trial, as exhibiting a lack of creditable evidence upon which to convict; the incompetency of the coroner's evidence of the statements of the accused; and the inadmissibility of the evidence of what the prisoner had said while under arrest, immediately after the occurrence. These points we will consider.

Three elements enter into the proof convicting the defendant of the crime charged in the indictment. They are: The testimony of an eye-witness of the occurrence; the admissions and statements of the prisoner, and corroborating circumstances in the evidence, of previous threats by the prisoner; and of what transpired about the time of the killing, according to the evidence of persons who, while not seeing the actual killing, saw the prisoner and the deceased on the road. They had observed his actions, and saw the condition

in which the body of the deceased was found. Before considering the points of the appellant's counsel, we may here say that the prisoner's statements of what occurred between him and the deceased are absolutely negatived by the facts. The position in which the body of the deceased was found made it impossible that he should have jumped from his cutter upon the defendant's sled to attack him, or that any attack could have been made by the deceased. The body was found upon the road, with the hands clenched in front, and still holding the broken rein. The blanket was around his legs, and the buffalo robe partly under and up under his right arm. Such circumstantial evidence made it clear that the deceased was stricken down while on his seat in the sleigh, and engaged in driving his horses. The accused, after making this deposition before the coroner and jury, refused, upon the subsequent day, to sign it, and denied making it. This subsequent action of the accused may have been predicated upon one of two mental conditions: Either that he was unwilling to sign a false statement, or else that subsequent reflection made him regret having made any statement at all. But the defendant's counsel argues that the statement before the coroner was inadmissible in evidence upon the trial; and he places the objection on the ground that the prisoner was then confined in jail upon the charge of murder, and that it was not a voluntary statement. These were not the grounds of the objection taken at the trial. At that time they were that the statements were not signed by the party. But, overlooking the absence of other objections, we will consider if any injustice was done, or any legal error committed in the reception of the coroner's evidence.

The object of the law has always been the accomplishment of justice by eliciting the truth about an occurrence in such a mode as to minimize the chances of error and mistake, and to charge the accused with guilt by the most direct proofs; and the aim of statutes of criminal procedure is to secure the punishment of a person, indicted for a crime, only by methods consistent with the maintenance of every safeguard against error and self-crimination. The design of the state is always to preserve intact for the benefit of the accused the presumption of his innocence, in the proceedings for his conviction, and courts should endeavor to scrupulously guard his privileges in that respect, and rather to err on the side of a tender regard for his rights; for the penalty is death. Section 196 of the Code of Criminal Procedure provides that, where a party is examined before a magistrate, he shall be informed as to his rights and privileges with respect to making any statements. Section 200 provides that the statement must be reduced to writing, and, if defendant refuses to sign it, his reason therefor must be stated, and it must be signed and certified by the magistrate. These conditions were met in the present case. Section 395 has provided that the confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by

threats, or upon a stipulation of the district attorney that he shall not be prosecuted therefor. The question, then, is, was the statement of the prisoner made before the coroner and jury admissible to prove the homicide? Clearly it was, under the provisions of section 395. It was made at his own election and request, and without the operation of the influences of fear, produced by threats, or of hope, under a stipulation that he would not be prosecuted. It was admissible even before the enactment of the Code provision; for it was voluntary, because it was made at the prisoner's own suggestion.

The case of *People v. McMahon*, 15 N. Y. 384, cited by the counsel for the appellant, is not against the principle of its admissibility. In that case the prisoner was arrested as the probable murderer; taken before the coroner, then holding an inquest over the body of the deceased; and was sworn and examined as a witness. Upon the trial his evidence so taken was read against him. This was held to be an error; but the ground taken by the court was that the testimony before the coroner was in its nature unreliable evidence, and that the reason of the rule of law which demanded its exclusion was in that consideration. It could not be said that the statements proceeded from the internal and spontaneous impulses of the prisoner alone, or were uninfluenced by any extraneous cause of sufficient force to prevent free and voluntary mental action; and that a judicial oath, administered when the mind was agitated by a criminal charge, might have that effect. Judge SELDEN delivered the opinion in that case, and he discussed the meaning of the term "voluntary," in reference to confessions. He thought there was an obvious principle underlying the rule which excluded the statements of a prisoner, where not made free from outside influences of a nature disturbing to the mind. He stated it to be that "we cannot safely judge of the relations between the motives and the declarations of the accused, when to the natural agitation consequent upon being charged with crime is superadded the disturbance produced by hopes or fears artificially excited;" and he defined a voluntary confession as one "proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause." In the case of *Teachout v. People*, 41 N. Y. 7, the statements of the prisoner before the coroner, being voluntarily made, and after he had been informed that he was under no obligation to testify, were held properly admitted upon the trial. The *People v. Mondon*, 103 N. Y. 211, 8 N. E. Rep. 496, was a recent case, decided since the passage of the Code. There the examination before the coroner was excluded, not because of any principle of inadmissibility inherent in the evidence generally, but because it had not, and could not have been in the nature of things, a voluntary confession. There, the prisoner, upon being arrested, was brought before the coroner as a witness and examined. He was an ignorant man, was unattended by counsel, and was not informed of his rights or privileges as to testifying. Judge RAPALLO reviewed this

question of the admissibility of the examination of persons under oath before a magistrate or coroner. He held that they must be excluded upon the subsequent trial for the offense, under circumstances where the prisoner, having been arrested as a suspected murderer, was taken before the coroner's inquest or examining magistrate, and there examined on oath as to circumstances tending to connect him with the crime. His opinion was given with reference to the facts of the case before him, which showed that there was no confession, but an examination before a magistrate. He expressly held that section 395 of the Code was intended to apply only to voluntary confessions, and not to change the statutory rules relating to the examination of prisoners charged with crime. It is thus perfectly clear that both before and since the enactment of the Code provisions the test of admissibility of the statements of a party accused of the commission of a crime, whether made in the course of judicial proceedings or not, is whether they were voluntary; and that can be determined by their nature, and the circumstances under which made. If in all respects, and however viewed, they could only have been the voluntary and uninfluenced statements of the individual, no principle of law warrants their exclusion; and the Code expressly authorizes their being given in evidence upon the trial.

The appellant's counsel argues that it was error to admit the testimony of a witness as to what the defendant said to the officer shortly after the arrest. No objection was taken at the trial; and, as the defendant's statements were voluntary ones, no objection would be tenable. It is no ground for the exclusion of admissions that they were made while the party was under arrest, if shown to have been made voluntarily, and free from influences of promises or threats. *Balbo v. People*, 80 N. Y. 484.

Another ground of error presented is that the jury should not have been allowed to consider the testimony of Nelson and Peter Brown. The appellant's counsel argues that they were perjured witnesses, on their own showing. If this were true, it would be no reason for any such instruction by the court to the jury. But it is not a correct conclusion from the facts respecting these witnesses. They were evidently men of low intellectual order, and dull of comprehension, and frightened at being drawn into the case. Nelson Brown was the eye-witness of the occurrence; and Peter Brown was the person at whose house, the evening before, the defendant had repeated his threats made to the deceased. Nelson Brown at first denied knowledge of the facts to which he on a subsequent day of the holding of the inquest did testify. Peter Brown did not state upon his examination before the coroner the facts of the conversation. It does not appear that they had any motives for this conduct, or were influenced otherwise than by fright or some kindred emotion. That was most probably the truth of the matter as to both; and possibly, in the case of Nelson Brown, there may have been superadded the motive to shield a

friend. At any rate, upon the trial they avowed their fright as the cause and explanation. They were not otherwise impeached as witnesses, and the judge commented in his charge upon the testimony of these witnesses, and said it was open to the criticism of counsel for the defendant, and he instructed the jury that they must be satisfied of its truthfulness. We think that it was for the jury to pass upon the question of the credibility of these witnesses. It was formerly held to be the rule that where a witness was shown to have willfully sworn falsely in a former proceeding in the case, or upon the trial, or, as in the case of *People v. Evans*, 40 N. Y. 1, where the false swearing was instigated by the prisoner, and the witness had been promised a reward for so swearing, that the jury should be instructed to disregard the testimony of such witness. *Dunlop v. Patterson*, 5 Cow. 243, is an early and leading case on that subject. The doctrine as to the treatment of testimony which is affected by contradictions and inconsistencies; or by evidence making its falsity manifest, and establishing a consciousness in the witness of its falsity, has been much considered in the books. Opinions have not always been in accord; but the weight of authority was in favor of the general rule that the question of credibility of a witness was one for the jury, and that the only exception to the rule was in cases where the discrepancies in the testimony were the result of deliberate falsehood. *The Santissima Trinidad*, 7 Wheat. 339; *Conrad v. Williams*, 6 Hill, 446; *People v. Evans*, supra; *Wilkins v. Earle*, 44 N. Y. 172; *Pease v. Smith*, 61 N. Y. 477; *Place v. Minster*, 65 N. Y. 89; *People v. Petmecky*, 99 N. Y. 415, 2 N. E. Rep. 145. But since the enactment of section 714 of the Penal Code, and section 832 of the Code of Civil Procedure, we must hold that a new rule obtains, and that the rule and policy of the law are to allow all testimony to go to, and be weighed by, the jury. By those sections a person convicted of any crime is, notwithstanding, a competent witness in any cause or proceeding, civil or criminal; but proof of his conviction is allowed for the purpose of affecting the weight of his testimony. In *People v. O'Neil*, 109 N. Y. 266, 16 N. E. Rep. 68, the court had refused to charge that if the jury should find that certain witnesses had, in their previous testimony in respect to the same matters, committed willful perjury, the jury should wholly disregard their testimony given on the trial. This was held not to be error; and *ANDREWS, J.*, said, in reference to the force of section 714 of the Penal Code: "It would be manifestly absurd, in the light of this statute, now to hold that an unconvicted perjurer was an incompetent witness, whose evidence could not be considered by the jury, when, under the statute, if he had been convicted his evidence must be received and weighed by the jury." Here the witnesses, in testifying to facts of which upon the preliminary examination they had denied knowledge, or which they had suppressed, may have been moved and deterred, as they swore they were, by motives of fright; and they appear to have been perfectly free from

improper instigations or motives to swear falsely. At any rate, it was for the jury to decide whether they were to be believed or not. There was other evidence of a circumstantial nature clearly pointing to the

defendant as the perpetrator of the crime, and which the jury could consider in connection with the evidence assailed. The judgment of conviction should be affirmed.
All concur.

DOWNING et al. v. DIAZ et al.

(16 S. W. 49, 80 Tex. 436.)

Supreme Court of Texas. March 27, 1891.

Appeal from district court, Webb county.
W. Showalter and J. O. Nicholson, for appellants. McCampbells & Welch, for appellees.

STAYTON, C. J. This is an action of trespass to try title, brought by appellees, who are shown to be entitled to take by inheritance from Joaquin Cuellar. They allege that the land in controversy, known as "*Porcion* No. 36," was granted to Jacinto Cuellar by the Spanish government in the year 1767, and that he gave it in exchange to Joaquin Cuellar for *porcion* No. 35, which was originally granted to the latter at the same time the land in controversy was granted to Jacinto. Jacinto and Joaquin Cuellar were brothers, and both died leaving descendants. Appellants claim through patents dated 9th and 20th of August, 1884, covering the same land embraced in *porcion* No. 36, and located by virtue of land certificates that issued since the adoption of the present constitution of this state. The cause was tried without a jury, and the court found the following facts: "(1) Plaintiffs, and those whose estate they succeed to, have been in actual, continuous possession, with improvements, of the *porcion* of land described in the petition; and within the knowledge of living and credible witnesses, who have testified herein, for at least 75 years prior to the institution of this suit, and claiming and holding under well-defined boundaries. (2) Said plaintiffs have so claimed and possessed the said *porcion* of land by virtue of and under what is termed 'An Act of General Visit of 1767,' archived under the Spanish government in that year, and recognized by it for over 50 years, and respected and acquiesced in by the Mexican government for 22 years, copy of which act was filed in the general land-office of Texas about 1871 by virtue of an act of the legislature of Texas, entitled: 'An act to provide for the obtaining and transcribing of the several acts or charters founding the towns of Reynosa, Camargo, Mier, and Guerrero, in the republic of Mexico, and of Laredo in Texas, and making an appropriation for that purpose. Approved April 24, 1871, and same constitutes now an archive of said general land-office under title 7, art. 57, subd. 5, Rev. St. Tex. (3) Under said act *porcion* 35 was originally adjudicated to Joaquin Cuellar and *porcion* 36 was originally adjudicated to Jacinto Cuellar; but I find from a preponderance of evidence that for at least 75 years the heirs and lineal descendants of Joaquin Cuellar have been in peaceable, adverse, and undisturbed possession of *porcion* 36, and the heirs and assignees of Jacinto Cuellar have been in adverse, peaceable, and undisturbed possession of *porcion* 35, and these *porciones* are contiguous. (4) Plaintiffs are the lineal descendants of Joaquin Cuellar, and inherit all his right, title, and interest in and to said *porcion* No. 36. (5) I find that

at the time of the location, surveys, and patenting of the lands claimed by defendants herein, *porcion* No. 36, upon which their said locations were made, and patents subsequently obtained, was equitably owned by plaintiffs under color of title from the sovereignty of the state, and the evidence of said appropriation was in the general land-office, and also evidenced by the occupation of the owners of said *porcion*, who were and are the plaintiffs herein. I find that the defendant James Downing had actual notice of same, as a tenant of plaintiffs at the time he made his locations. (6) The lands claimed by defendants are within and upon *porcion* numbered 36, owned and possessed by plaintiffs as shown by the survey in evidence. (7) I find that the defendants herein, respectively, are the patentees of the land described in the answer and numbered, respectively, 91 and 92, in the name of James Downing, and 410 in the name of W. Von Rosenberg, and same from the certificates recited therein were patented and the locations thereunder made since the constitution of 1876 went into effect." As conclusions of law the court found: "(1) Under the first, second, and fourth conclusions of fact I find that plaintiffs have a good and perfect title to *porcion* of land numbered 36, and they are entitled to decree quieting them in their title and possession, and defendants must be enjoined from claiming any part of the same, or further asserting title by virtue of their patents, which are null and void, and must be delivered up for cancellation. (2) Under the third conclusion of fact an exchange of *porciones* 35 and 36, between Joaquin Cuellar and Jacinto Cuellar, is presumed. (3) Under the fifth conclusion of fact defendants cannot recover herein in the nature of plea reconvention possession of the lands described in their patents, as said patents are null and void." On these findings a judgment was rendered for the plaintiffs. The questions raised relate to the admission and rejection of evidence and to the sufficiency of the evidence to sustain the presumptions indulged by the court.

The land in controversy was formerly within the jurisdiction of the town of Guerrero, once known as "Revilla." A paper was offered in evidence which was a certified copy from the general land-office of a paper therein filed by J. L. Haynes in pursuance of the act of April 24, 1871, (Pasch. Dig. art. 5826.) That paper was by Haynes, in pursuance of the act referred to, obtained from the archives of the town of Guerrero, and purports to be a copy of the proceedings of a *sub de legation* composed of the same persons, acting under the same authority and for the same purpose, as shown in the case of *Railway Co. v. Jarvis*, 69 Tex. 527, 7 S. W. Rep. 210. In that case the law under which Haynes was acting when he obtained and filed in the general land-office the paper from which the copy used in this was taken, as well as a statement of the official character of the persons whose acts it purports to evidence, and the purpose of the visit of the *sub de legation* will be found, as well as a statement of the general course of procedure. The paper offered in evidence in

this case bears the same relation to the town of Guerrero, its inhabitants and property rights, as did the paper offered in evidence in the case before referred to, to the town of Laredo, its inhabitants and property rights. It is in effect the charter of the town, and at the same time the evidence of the right of the town to lands set apart for public use, as well as the evidence of the right of each settler to the land then designated and granted to him. Both towns embraced lands on each side of the Rio Grande. The locality of the several *porciones* granted to individuals may be definitely ascertained from the instrument as well as the relation of land granted to one to that granted to another. The recitals in reference to *porciones* 35, 36, and 37 are as follows: "(35) On the same course and river bank they measured thirty-four cords, which make seventeen hundred Mexican varas, which, with as many more on the opposite head and twenty thousand on the sides, adjust a *porcion*. They identified it, and, being applied for by Don Joaquin Cuellar, it was left to him. (36) They measured an equal number of cords on the same course, which makes seventeen hundred Mexican varas, and with as many more on the opposite head and twenty thousand on the sides, a *porcion* which they marked out complete, and, being applied for by Don Jacinto de Cuellar, it was left to him. (37) On the same course and river bank they measured the same cords, which complete seventeen hundred Mexican varas, with as many more on the opposite head and twenty thousand on the sides, a *porcion* which they marked out, and, being applied for by Bartolimi Cuellar, it was left to him,"—and in this manner proceeded the designation of *porciones* until all the settlers received lands. There is evidence of much detail in the whole transaction from its inception to the close, with strict conformity with the laws then in force. After the several allotments were made, the *sub de legates* made the following declaration: "We hold, as adjudicated, the sixty-nine *porciones* of land partitioned to the residents and settlers of this town and its jurisdiction, as the surveyors declare they have done with the assistance at the time of surveying them of some interested parties. * * * For the full execution of their contents a '*testimonio*' thereof shall be left to the captain or justice to be archived for the protection of the parties so soon as he shall effect the taking of possession, when he shall establish conspicuous and lasting monuments in every *porcion* and *sitio* assigned in order that the possession thereof may prevent all damage and injury to third parties." Christibal Benz Benavides, "captain or justice," was required to place persons to whom lands had been allotted in possession, and after having done so to attach the original evidencing his acts to the *testimonio* left by the *sub de legates*, and the same to archive for his protection of all persons interested, and also to forward to the *sub de legates* a *testimonio* of his proceedings. In pursuance with the order Benavides placed the settlers in possession of the lands that had been allotted

to them, but possession seems not to have been given in the order in which allotments were made; and in some instances exchanges made between persons after allotment, but before judicial possession was given were recognized as valid in the act of possession. In the proceedings by him the following appears: "(29) Next they proceeded to the place called '*Las Animas*,' under which patronage three *porciones* of land are contained. The first belongs to Don Jacinto de Cuellar; (30) the second to Don Joaquin Cuellar; (31) and the third to Don Bartolomi de Cuellar. When making the proper demonstrations, as before the said Jacinto appeared, personally representing the persons of his father and brother, adjoining his own tract, possession was delivered to him in the name of all, and he received it in proper conformity as the former ones upon the stated conditions, the said witnesses being present." Possession preceding and following this was given to the same persons to whom the allotments preceding and following were made. He also gave possession of lands to the mission and lots in the town to settlers, as provided in the orders of the *sub de legates*, and closed the record of his acts by a declaration that the instrument then executed was such a record made for their perpetuation of which he ordered a *testimonio* "be made item by item, literally, which, being done, shall be forwarded to his Lordship Brigadier Don J. Fernando Palacia, governor and vice captain general of this colony, in obedience of orders, and that his original be attached to the *testimonio* of partition."

To give a full statement of the contents of the paper offered in evidence as a copy of that known as the "General Visit" would consume more time and space than can now be given to that purpose, but we may say that it throughout, from day to day, was executed with all the formalities required at that time, and bears evidence that the protocol from which taken was a true and faithful record of what occurred at the time the town of Guerrero was established as a Spanish municipality. The proceedings thus evidenced began early in July, 1767, and ended on August 20th of that year. Following the papers before referred to in the transcript filed in the general land-office by Haynes, from which all the copies offered in evidence were taken, are many papers, some of which appear to have been taken from protocols, executed in all respects as the laws then in force required during the latter part of the last century, and early in the present, which refer to the paper known as the "General Visit," and recognize particular appropriations of land as thereby made. One of these was an application made by Jose Miguel de Cuellar, of date February 20, 1801, directed to the governor of the province, in which he made known to the governor that he had succeeded to the right of his father, Bartolomi Cuellar, to the *porcion* of land set apart in the "General Visit," which was *porcion* No. 37, and complaining that his brother Joaquin Cuellar had shut him off from the view on the south by an inclosure, and thereby prevented his stock from getting water,

and praying that the governor appoint some competent person "who shall, in accordance with the said acts of the 'General Visit,' run the line, as it appears that said *porcion* was given and bounded, and that it be surveyed and run in accordance with the tenor of said act, fronting on the river, and with its depth on the established courses as they appear in the proceedings of partition of lands, in order that with surety I may obtain a watering place on my property." In reply to this petition the governor made the following order. "I confer commission upon Don Fraco Corduite, who will, as is asked by this party, conform himself to the 'General Visit,' with citation of adjoining owners, and declare the boundaries of the *porcions* of land referred to, and cause mortar and stone monuments to be erected thereon." On March 9th of same year Corduite caused the order to be sent to the custodian of the writings known as the "General Visit," requiring them to be sent to him, in order that he might duly discharge his commission, which embraced other land matters besides that already referred to, and in pursuance of this order it appears that they were sent, and that Corduite then re-established the lines and corners of these *porcions* as were they at first, in which all interested parties concurred; and on the 14th of the same month the papers were remitted to the governor, who, on November 18, 1801, finding the work correct, approved it; but it does not appear when the papers known as the "General Visit," properly archived in Guerrero, but delivered to Corduite were returned to their proper archive. The act preceding the paper which purports to be a record of the proceeding of the *sub de legates* and of Benavides, who was empowered to establish lines and corners of *porcions* and to give possession in 1767, is as follows: "In the city of Guerrero, in the free state of Tamaulipas, on the third day of the month of March, eighteen hundred and thirty-one, I, Santiago Vela, constitutional alcade, acting with assisting witnesses in default of a notary, there being none in terms of law. In view of the resolution of his excellency the governor of the state, agreeably to his counsel, dated the 15th of October, in the year of 1830, last past, upon the restoration of the proceedings or acts of visit of this city, I order that it takes effect in all its parts, copying in the form of *testimonio* the said documents, in order that, being protocolled, they may perpetuate the evidence of possession of the first settlers of this city. This I have determined by this decree. Signed by me, with my assisting witnesses in the prescribed form, which I certify. [Signed] SANTIAGO VELA. Assisting witnesses: JOSE MA FLORES. FLORENCIO VILLAREAL." Then follow the entire proceedings of the *sub de legation* and other papers referred to, which were properly authenticated and delivered to the state's agent on September 9, 1871, by whom they were filed in the general land-office, and certified copies therefrom were used on the trial of this cause. Haynes, with the papers before referred to, and embraced in the transcript certified by the proper authorities at Guerrero, also filed a statement

which purported to have been made on February 4, 1831, but by what authority is not shown, showing to whom lands were granted by the "General Visit," who owned them at time statement was made, what lands were granted in 1784, and what lands were denounced in the year 1810, or under the colonization law, and on this it appeared that *porcion* 35 was granted to Jacinto Cuellar, 36 to Joaquin Cuellar, and 37 to Bartolomi Cuellar, which were stated to be owned by the heirs of these persons, except No. 35, which was held by a person named as a purchaser. The paper last named was objected to on the ground that it did not appear that it was an archive at Guerrero or in the general land-office, and it was further claimed that the original would not be admissible if produced. It sufficiently appears from the certificate authenticating the transcript filed by Haynes that the paper was an archive at Guerrero; and if it appeared that it was such a paper as Haynes was authorized, by the act under which he was appointed, to preserve a copy of them, the copy filed by him in the general land-office would be an archive of that office; but as presented we are of opinion that it should have been excluded on proper objection. We are of opinion that the act under which Haynes was appointed did not authorize him to procure and file it in the general land-office; for the original was neither an "act, charter, or grant affecting the lands on the east side of the Rio Grande," but merely a statement, it may be, of some official of the town of Guerrero as to his opinion as to the matters of which the paper speaks. In this case, if it was not properly an archive in the general land-office, the certified copy offered was not admissible.

The objection to papers before referred to, other than those which are termed the "General Visit," made on the trial, was as follows. "Because all that portion of said document beginning on page 64, at the said words, 'In the town of Revilla,' and all the continuing portions thereof, appear to be made up of recitals of persons regarding matters and things not relevant to the issues of this cause, and not admissible in the form offered, and instruments and documents which do not purport to be archives in any office in Mexico, and none of which are entitled to be archived in the general land-office of Texas." The papers here referred to are not mere recitals, not relevant to the issues in this case, but evidence the acts of the officers of the Spanish government in making grants of land, in the adjustment of boundaries of land granted, ascertainment of unappropriated lands, and like matters. Some of them had bearing on the question of right of Joaquin Cuellar to the land in controversy, and as to its boundaries, and all in some manner affected lands on the east side of the Rio Grande, and threw more or less light on the very matters in reference to which information was sought through the act of April 24, 1871. Such being their character, and it being clear that they were properly archived at Guerrero, the copies filed by the state's agent in the general land-office became archives of that office, as held in Railway Co. v.

Jarvis, 69 Tex. 527, 7 S. W. Rep. 210. There were many objections made to the introduction of the certified copy of the paper known as the "General Visit," which consists solely of the writings evidencing the acts of the *sub de legates* Palacio and Osorio, and of persons acting under their instructions, which were authenticated by themselves with the necessary witnesses, and by Benavides, who was authorized by them to place inhabitants in possession of lands allotted at time surveys were made. The paper takes its designation from the fact that it evidences the acts of the *sub de legates* who came to the Rio Grande frontier, at time named, to organize the frontier towns, and to designate the lands that should pertain to each for several public purposes, as well as to allot lands to the settlers of such towns, and to give evidence of the rights conferred. The many objections urged to the admission of the certified copy from the land-office may and will be grouped.

1. It was claimed that the paper offered in evidence was neither a copy of an archive in the land-office, nor of a paper that could legally become an archive. As held in *Railway Co. v. Jarvis*, 69 Tex. 527, 7 S. W. Rep. 210, it rests with the legislature to determine what shall become an archive; and under the statutes referred to in that case it must be held that the paper in the general land-office from which the copy offered in evidence was taken was an archive, but its effect as evidence is a matter for consideration hereafter.

2. It was objected that the loss of the original was not proved, nor its absence accounted for; and this objection embraces both the protocol and original *testimonio* evidencing the proceedings known as the "General Visit." From the record before us it appears that both the papers referred to, properly become archives in two places in a foreign country; and from the nature of the proceedings evidenced by them, did it not so appear in the record, this court would take judicial knowledge that they should so have become, and could not be legally withdrawn for production here. The record of the proceedings was, in effect, the charter of the town of Revilla, now known as "Guerrero," as well as evidence of the town's right to all lands set apart for public use, and, at the same time, the evidence of individuals' rights to the tracts of land allotted to persons in whose favor no separate evidence of right was given. The protocol, unless otherwise directed by competent authority, was required to be placed in the proper archive of the government, while the original remained with the interested parties as the evidence of their right; and affecting, as it did, the town in its municipal character and ownership, the archive of the town was the proper place of deposit. The paper evidences the fact that neither the protocol nor original could be legally surrendered by their custodians to individuals to be taken to another country, or for any other purpose; and the objections now considered were properly overruled.

3. It was urged that the paper from which that filed in the general land-office

was copied was not an archive in the town of Guerrero, and that this appears from the instrument itself. So far as the contents of the paper show, it was one not only such as it was proper to make an archive of that town, but one which by competent authority was required to be so made. In reference to such a matter it is peculiarly proper to presume that was done which ought to have been done, and especially so after the lapse of so many years. If the original, authenticated by the *sub de legates* with necessary witnesses, and evidencing their acts, and the protocol, properly authenticated, evidencing the acts of Benavides under their orders, were found archived at Guerrero, they would be held to make full proof of the facts testified to by them, in the courts of all countries where the laws of Spain are in force, and in all courts governed by the rules of the common law wherein should arise a question as to the faith to be given to such instruments, executed when the Spanish laws were in force, and affecting property subject to the dominion of that sovereignty. It is not clear from the record, except as before stated, how the papers from which those in the general land-office were copied were authenticated; but it is evident that the copy in that office was not made from the original left by the *sub de legates*, and the protocol executed by Benavides with proper witnesses, which was directed to be attached to that original and both to be archived in Guerrero. We have seen not only that the papers last named were directed to be archived at that place, but that this was done; and we have also seen that, under the order of the governor of the province, these papers were directed to be delivered to Corduite, and that they were received by him. These facts appear through papers properly authenticated, and the record clearly manifests that the labors of Corduite were governed by these papers, to which frequent reference is made. Whether the papers archived in Revilla in 1767, and removed by order of the governor in 1801, were ever returned, cannot be clearly ascertained from the record before us; but it is evident that they, or copies of them, were returned with a resolution of the governor of the state of date October 15, 1830. The resolution is not found in the record; but the inference from what does appear is that it accompanied the papers removed in 1801, or copies of such papers, and contained an order that they should be copied, and placed in such enduring form as would perpetuate the evidence of the rights of the first settlers, as well as of the town. From the decree of March 3, 1831, it is evident that what was then done was in obedience to the order or resolution of the governor of October 15, 1830, and that this required whatever papers were restored to be copied "in the form of *testimonio*, the said documents, in order that, being protocolled, they may perpetuate the evidence of possession of the first settlers of this city." What was directed to be done was to perpetuate evidence of rights, which would be impossible if the record to be made would not import verity. The meaning of the language above quoted is

not clear; but, in view of the fact that one of the papers constituting the "General Visit" was a *testimonio*, and the other a matrix or protocol, a copy to be made from them would be, not only in form, but in fact, a *testimonio*, and the direction that they should be protocolled for perpetuation carries with it the idea that they should be copied into a book. The Spanish word "*protocolo*," when applied to a single paper, means the first draft of an instrument duly executed before a notary, —the matrix,—because it is the source from which must be taken copies to be delivered to interested parties as their evidence of right; and it also means a bound book in which the notary places and keeps in their order instruments executed before him, from which copies are taken for use of parties interested. It is evident that in neither of these senses, strictly, was the Spanish word translated "*protocolled*," used in the order of March 3, 1831; but the inference is that by resolution of the governor of date October 15, 1830, the person who made the order of later date, and made the record from which the transcript in the general land-office was taken, was directed to place in a book for preservation, as are matrices when said to constitute a protocol. The copies which the governor intended should be preserved are evidence of rights, public and private, conferred by the acts of the *sub delegates*, and persons acting under their orders; and we may be permitted here to say that, after so great a lapse of time, with our restricted means of acquiring correct information, it would not be just to assume that what was deemed sufficient evidence of right by the officers of the former government, who must be presumed to have been familiar, not only with the general laws then in force, but with the special laws and usages of the time, as well as the facts attending a particular transaction, is now entitled to no consideration. We cannot hold, under the facts presented, that the papers from which the transcript filed in the general land-office was made were not archives in the town of Guerrero.

4. It was urged that the introduction of the certified copy from the general land-office was forbidden by section 4, art. 13, of the constitution; but it is evident that the section of the constitution has no application to it. *Railway Co. v. Jarvis*, 69 Tex. 546, 7 S. W. Rep. 210. It was claimed that the paper should have been excluded because it does not show that *porcion* No. 36 was granted to Joaquin Cuellar, and because it does not sufficiently describe the land. It is true that the paper does not show that the *porcion* was originally granted to Joaquin Cuellar, through whom plaintiffs claim; but one step in their derivation of title was to show that the land was granted to Jacinto Cuellar by the Spanish government, and through him they seek to show title in their ancestor; and, if the paper tended to prove that fact, it was admissible, unless subject to some other objection. Looking to the whole paper, there can be no doubt that the land can be identified by the description therein given.

5. It was urged that the paper did not show more than an inchoate grant, and

that for this reason it should have been excluded, unless proof of confirmation was made. The paper, upon its face, does not purport to evidence an inchoate right; but, if it did, this would not furnish sufficient reason for excluding it as evidence of some right and description of the land; and confirmation ought to be presumed, if necessary, from the long and continuous possession shown under claim based on the proceedings evidenced by the paper.

6. It was several times urged, in effect, that the record from which the copy filed in the general land-office was taken would not have been admissible to prove the facts stated in it, or for any other purpose. If that be true, the paper offered should have been excluded; but if that be not true, then the transcript filed in the general land-office, or a certified copy taken from that, ought to have been received as evidence of the facts which the paper states to be true; for, the transcript in the land-office having become by law an archive, certified copies from it may be used in evidence in cases in which the record now found in Guerrero could be. The objections now under consideration are based on the proposition that the record found in Guerrero is but a copy, and too remote from the protocols to be received in evidence. It must be conceded that the record in Guerrero now found in the archives of that town was made in the year 1831; and it is proper to hold, from what appears, that it was copied from the papers there filed in 1767, subsequently removed, and not returned until some time after October 15, 1830. That record, in so far as it contains the proceedings of the *sub delegates*, would be what is termed in the Spanish law a "*traslado*," which is a copy taken by a notary from the original, or a subsequent copy taken from the protocol, and not a copy taken directly from the matrix or protocol; but, in so far as it contains the proceedings by Benavides, it would be, so far as the record shows, what is the original, because the first copy taken from the protocol, or at most a subsequent copy taken from that paper. It may be conceded that to entitle a paper of the class last described to entire faith under the Spanish law, it should be given by the officer before whom the protocol was executed, or if by another notary on inquiry after citation to parties adversely interested; and, further, that under the laws in force here the execution of the copy would have to be proven even when the protocol is an archive of the government, unless by reason of its age it was entitled to be introduced as an ancient instrument. A paper of the class first named,—a copy taken from an original,—under the Spanish law, was only entitled to full faith against the party producing it, unless given after citation to the person adversely interested under judicial sanction; but it seems to be held, when such a copy is given by the notary before whom the protocol was executed, and by whom the original was extended, that even such copies are entitled to full faith. But, under that law, even a *traslado*, if it be ancient, is entitled to full faith, although given by a notary other than the one before whom the protocol or original were

authenticated, and without citation and judicial sanction, in cases in which the property passed by it is possessed under the right conferred by it for the period of 30 years. These rules of the Spanish law, however, have no force here, further than that we may look to them to ascertain the character of evidence one claiming a grant of land from the Spanish government ought to produce. Assuming, then, that the copy offered in evidence is an archive in the general land-office, and that its remoteness from the protocols is as stated, then, in view of the facts shown by other instruments, to which the objection now under consideration does not apply, and of the further fact that plaintiffs, and those through whom they claim, have had continuous possession of the land described in those instruments, and claiming through them, for a period of 75 years, can it be held that the certified copy was not admissible under the rules of the common law to show the boundaries of their claim, and the grounds on which this has been so long asserted, if for no other purpose? We think not, and it is unnecessary for us now to determine whether it would be admissible and sufficient to show title if uncorroborated by other facts. In *State v. Cuellar*, 47 Tex. 295, extracts from the papers we have referred to were considered, and properly held not to be admissible in an action for confirmation of title; but the transcript before us shows all the matters which the court was then unable to understand from the brief extracts used in that case; and, besides, since that case was decided the copy now in the land-office has been made by law an archive. Many of the questions relating to the admission of the papers in question were considered in *Railway Co. v. Jarvis*, 69 Tex. 530, 7 S. W. Rep. 210, which involved a similar question, which may be looked to, on matters now not fully discussed, for the reasons on which some rulings are made. It is urged that the court erred in finding that plaintiffs, and those through whom they claim, before the institution of this action had possessed the land continuously for at least 75 years, claiming it under well-defined boundaries; but the evidence fully sustains the findings, and there is evidence tending to show that their ancestor was in actual possession of the land at the beginning of this century, when the boundary between it and *porcion* No. 37 was for the second time established by the government. The same facts tend to show the exchange between Jacinto and Joaquin Cuellar, and justified the court's finding in this respect; and the recognition of the right of plaintiffs and their ancestors to the land by former governments and by this, until the patents relied on by the defendants issued, is to be inferred from the fact that their claim was asserted by possession, recognized by the vicinage as well as by papers in the archives of the former government, and their right was never questioned by any government or individual until appellants concluded that the land was vacant.

It is urged that the court erred in finding that the land was equitably owned by plaintiffs under color of title from the sovereignty of the soil at the time appellants

made their locations; but, if we disregard all the evidence contained in the certified copy of the "General Visit" issued from the general land-office, no other conclusion ought to have been reached from the other evidence in the case, looking to the laws of which the court should have taken judicial notice. At the opening of this century the father of Joaquin Cuellar, to whom was granted *porcion* No. 37, made known to the authorities that his son was in possession of the land in controversy, which was contiguous to his, and that by inclosure made by the son on the south he was excluded from water. By the act of February 10, 1852, *porcion* No. 37 was confirmed to the father, and *porcion* No. 35 to Joaquin Cuellar, and between those is *porcion* 36, the land in controversy, of which plaintiffs and ancestors had continuous possession for 75 years before the trial of this cause, claiming the land as their own. These facts alone would have justified a finding that plaintiffs were not only the equitable owners, but that they held it under title from the sovereignty of the soil. The findings of fact required the findings of law; and, while it is not necessary to rely upon the certified copy of the "General Visit" to show the title of the plaintiffs, we desire to note the fact that by the act of February 10, 1852, (Pasch. Dig. art. 4461,) no less than 20 *porciones* of land within the jurisdiction of Guerrero were confirmed by numbers, as given in that instrument, to the persons to whom that showed these several *porciones* were granted in 1767; and, had application been made for confirmation of *porcion* No. 36, it doubtless would have been made at the same time as was done in regard to those above and below and contiguous to it.

This action was brought by 16 persons all of whom claim by inheritance from or through Joaquin Cuellar, except some who were husbands of persons thus claiming, and joined *pro forma*, and among those so claiming is Francisco Cuellar. In bar of this action, defendants pleaded a judgment of the district court for Travis county in favor of the state, rendered against Francisco Cuellar, in an action brought by him as an heir of Jacinto Cuellar, in which he assumed to sue for himself and co-heirs, who were not named, for confirmation of title to the *porcion* of land in controversy. That action was brought early in the year 1871. On the trial of this cause defendants offered to read in evidence copies of the pleadings, judgments, and statement of facts in that case; but the court excluded the statement of facts on objection, and admitted the pleadings and judgments. It is urged that the court erred in excluding the statement of facts, but this ruling was evidently correct. It is also urged that the court erred in excluding what is termed the "Judgment Voll," but this is not sustained by the record, for it was admitted under defendants' plea of not guilty, as shown in the statement of facts.

It is claimed that the court erred in not rendering judgment in favor of appellants on their plea of *res adjudicata*, but there was no error in this ruling for several reasons. That action was by Francisco

Cuellar alone, and a judgment therein could not bar the right of the other plaintiffs in this case, even if it would bar an action by him; but that action was prosecuted by him as an heir of Jacinto Cuellar, and it would be no bar to this, even as to him, for he now sues in a different right. *Thompson v. Cragg*, 24 Tex. 582, *Carnth v. Grigsby*, 57 Tex. 266. If, however, that judgment could operate as a bar to him, this would not better the condition of appellants; for, the land being

equitably owned, titled, and occupied by plaintiffs at the time defendants' locations were made, under the provisions of the constitution they could acquire no interest in it, (Const. art. 14, § 2.) and the other plaintiffs would be entitled to recover. Although the court below erred in the matter noticed, that furnishes no reason for reversing the judgment; for, on the evidence, no other judgment than the one entered could have been rendered, and it will therefore be affirmed. It is so ordered.

STEINBRUNNER v. PITTSBURG & W. R. CO.

(23 Atl. 239, 146 Pa. St. 504.)

Supreme Court of Pennsylvania. Jan 4, 1892.

Appeal from court of common pleas, Allegheny county.

Action by Barbara Steinbrunner against the Pittsburg & Western Railroad Company for damages for the death of plaintiff's husband, alleged to have been caused by defendant's negligence. Judgment for plaintiff, and defendant appeals. Reversed.

John McCleave, for appellant. Marcus A. Woodward, for appellee.

PAXSON, C. J. Upon the trial in the court below, it became a vital question of fact whether the deceased, Xavier Steinbrunner, stopped, looked, and listened just before he crossed the railroad track. One witness for the plaintiff, Miss Margaret Martin, testified distinctly that he did stop on the sidewalk crossing of Cherry street. There was positive evidence, however, the other way. Charles Rentz, a witness for the defense, testified that the deceased did not stop. "He didn't look either way; never looked either way; just came straight through." William Cernuska testified that he saw the deceased from the time he started down the hill until he was struck by the train; that he did not stop, nor look either way; that he had a bag in his hand, and was looking at it. William F. Crooks, another witness, says: "I noticed Mr. Steinbrunner just coming out of the foot of Cherry street, and he come on down, and when he got along-side of the side track, about three feet this side of the first track, the wheel kind of scotched. He stopped just about a second, and then he went ahead, and when the horse was about halfway over the main track the train struck him. * * * He made no other stop. * * * Didn't see him look up or down. He had his head down, kind of this way, [illustrating.] It seems to me he was counting some money or something. I know that he didn't look up or down. When his wagon checked for that short time, I thought he was going to wait till the train passed on." Under these circumstances we think it was error for the learned judge below to say to the jury: "The fact is uncontradicted that he did stop at the crossing on Cherry street just as he crossed over and came on River avenue, but did he stop for the purpose of looking out for trains?" It may be the learned judge used this language inadvertently. This is probable from the fact that it is inconsistent with the portion of his charge which immediately preceded it. But as it stands it appears to be an erroneous statement of the evidence upon the pivotal fact in the case. We cannot say what influence it had with the jury. Where a judge states the evidence in two ways, one in favor

of a corporation and the other against it, a jury may be depended upon to adopt the latter.

The sixth specification alleges that the court erred in answer to the plaintiff's second point. The point involved the measure of damages, and in most respects was correctly answered. But when the learned judge told the jury that they should look at this question "from a broad and sensible point of view, and liberal, because it is not a case to cut off corners too closely," we think the expression was unwise, to say the least. Juries do not need encouragement from the court to give large verdicts against corporations, especially railroad corporations. Courts and juries should be just to both corporations and individuals, but no one has a right to be "liberal" with the money of other persons. While we are not prepared to say we would reverse for this reason alone, we have considered the matter of sufficient importance to call attention to it.

The only remaining specification of error which we think it necessary to refer to is the ninth, which alleges that the court erred in admitting certain evidence of the deceased's expectation of life, based upon the Carlisle tables. The question asked the witness was, "Will you state to the jury what the expectation of life is of a man in good health, 46 years of age?" and the answer was: "The Carlisle table would make it 23.81 years; the American table, 23.8 years." Neither of the tables appears to have been offered in evidence, but, as the answer of the witness was based upon evidence obtained from them, their effect may well be considered in connection with this specification; and, as the American table depends upon the same principle as the Carlisle table, we will discuss the question more particularly in reference to the latter. In estimating the damages for the death of the deceased, his expectation of life became an element of importance. His earning power being fixed by the evidence, the next question to be settled by the jury would naturally be, how many years will he probably live to exercise this power? This can never be decided accurately in single cases. The most a jury or any one else can do is to approximate it. A man may die in a day, or he may live to earn wages for 20 years. It follows that there must always be an element of uncertainty in every such case. But there are some rules to be observed which aid to some extent in such investigations. Thus, if a man is in poor health, especially if he is suffering from some organic disease which necessarily tends to shorten life, his expectancy is much less than that of a man in robust health. Again, the age of the person and his habits are among the important matters for consideration. It needs no argument to show that the expectation of life is much greater at 21 years of age than at 50. The value of the

Carlisle tables as bearing upon this question depends in a measure upon the manner in which they were made up. If based upon selected lives, that is to say, only upon lives which are insurable, they would be of value only for life-insurance purposes, and utterly useless to apply to unselected lives or lives generally. The evidence in this case is not very clear as to the mode in which these tables were composed. I have therefore consulted the *Encyclopædia Britannica*, a very high authority, (volume 18, p. 169,) from which I extract the following: "The Carlisle table was constructed by Mr. Joshua Milne from materials furnished by the labors of Doctor John Heycham. These materials comprised two enumerations of the population of the parishes of St. Mary and St. Cuthbert, Carlisle, (England,) in 1780 and 1787, (the number of the former year having been 7,677, and in the latter 8,677,) and the abridged bills of mortality of those two parishes for the nine years, 1779 to 1787, during which period the total number of deaths was 1,840. These were very limited data upon which to found a mortality table, but they were manipulated with great care and fidelity. The close agreement of the Carlisle table with other observations, especially its agreement, in a general sense, with the experience of assurance companies, won for it a large degree of favor. No other mortality table has been so extensively employed in the construction of auxiliary tables of all kinds for computing the value of benefits depending upon human life. Besides those furnished by Mr. Milne, elaborate and useful tables based upon the Carlisle data have been constructed by David Jones, W. T. Thomson, Christopher Sang, and others. The graduation of the Carlisle table is, however, very faulty, and anomalous results appear in the death rate at certain ages." It appears, therefore, that the Carlisle table is based upon general population, and not upon selected or insurable lives. In Shippen's Appeal, 80 Pa. St. 391, it was held that the Carlisle table was not authoritative in determining the value of a life-estate, and the

common-law rule of one-third the capital sum was adopted as the measure of the life-interest. It was said in the opinion of the court: "As to the measure of the life estate of Slayton T. Platt, we may add that the Carlisle tables are not authoritative. They answer well their proper purpose, to ascertain the average duration of life, so as to protect life insurers against ultimate loss upon a large number of policies, and thereby to make a profit to the shareholders. But an individual case depends on its own circumstances, and the relative rights of the life tenant and the remainder-man are to be ascertained accordingly. A consumptive or diseased man does not stand on the same plane as one of the same age in vigorous health. Their expectations of life differ in point of fact." We can understand that in a contest between a life-tenant and the remainder-man the Carlisle tables would not serve as an authoritative guide. In such instance the question must be decided upon its own facts. But in a case like the one in hand, where the expectation of life of the deceased was a question of fact for the jury, we are unable to see why the tables referred to were not competent evidence. Being intended for general use, and based upon average results, they cannot be conclusive in a given case. That is not the question here. It is whether they are not some evidence, competent to be considered by a jury. Their value, where applied to a particular case, will depend very much upon other matters, such as the state of health of the person, his habits of life, his social surroundings, and other circumstances which might be mentioned. While we are unable to see how such evidence is to be excluded, I must be allowed to express the fear that it may prove a dangerous element in this class of cases, unless the attention of juries is pointedly called to the other questions which affect it. Upon the whole, we are of opinion the evidence referred to was properly received, and this specification is not sustained. The judgment is reversed, and a venire facias de novo awarded.

KANSAS CITY, M. & B. R. CO. v. SMITH.

(8 South, 43, 90 Ala. 25.)

Supreme Court of Alabama. June 11, 1890.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

This action was brought to recover damages for personal injuries sustained by plaintiff on account of a wreck alleged to have been caused by the negligence of defendant. The complaint contained two counts, on which issue was joined, viz., the first and third. In the first of these, the plaintiff sought to recover for the alleged negligence of the defendant in using in the train and transportation an old, weak, and defective car, which by being overloaded, gave way on a trestle and caused the wreck, whereby the plaintiff was injured; and in the third count the plaintiff based his recovery upon the alleged negligence of the defendant by reason of defects in the condition of the ways, works, and machinery used by the defendant, whereby the accident occurred. Issue was joined on these counts by the defendant pleading the general issue, and contributory negligence. Upon the trial, as shown by the bill of exceptions, the plaintiff introduced evidence tending to show that the car which gave way, and thereby caused the accident, was an old car, and the timbers thereof were rotten, and insecure; that it was loaded with some kind of fertilizer or guano, and was overloaded; and that, while on a trestle, this car by reason of being old, rotten, and insecure, and because of being overloaded, gave way, and fell through the trestle, thereby causing the wreck wherein the plaintiff was injured. The evidence introduced by the defendant was in direct conflict with the evidence of the plaintiff, and tended to show that the cars used in said train, its machinery, and its road-way were in good condition, and that the said car was not overloaded, and that the accident did not occur from any negligence on its part. During the trial, after the examination of Mary A. Hughes, a witness for the plaintiff, who testified that she took a photograph of the wreck about two hours after it occurred, and on being shown the photograph testified that that was the one, and that it was a correct picture of the wreck and its surroundings, the plaintiff offered to introduce the photograph in evidence. The defendant objected, but the court overruled its objection, allowed the photograph to be introduced in evidence, and the defendant thereupon duly excepted. During the examination of one Slaton, as a witness for the plaintiff, he was asked, "How long, how wide, and how thick is a sack of guano that weighs from 167 to 200 pounds?" The defendant objected to this question, but the court overruled its objection, and allowed the witness to answer against the exception of the defendant as follows: "A 200-pound sack is about 24 inches long, about 18 inches wide, and, when it is down, it is about 9 inches thick, lying down as it lays in a car." Before the trial was entered into, the defendant demanded a struck jury for the trial of this cause. At the time this demand was made, there

were only 23 regular jurors in attendance upon the court. The court thereupon instructed the sheriff to "summon one R. E. Seelye as such juror, and he was sworn as such and placed upon the jury." Upon being furnished with this list of jurors, as thus completed, the defendant objected to the list of jurors; but the court overruled its objection, and the defendant duly excepted. There was judgment for plaintiff, and defendant appeals.

Hewitt, Walker & Porter, for appellant.
Bowman & Harsh, for appellee.

SOMERVILLE, J. 1. The photograph of the trestle and of the wrecked train of cars was shown to have been taken about two hours after the accident occurred, and was verified by the testimony of the photographer as being a correct representation of the locality and scene. It was clearly admissible in evidence to aid the jury in properly understanding the case. It is a well-understood rule, applied in every-day practice in the courts, that diagrams and maps illustrating the scene of a transaction, and the relative location of objects, if proved to be correct, are admissible in evidence in order to enable the jury to understand and apply the proved facts to the particular case. 3 Brick. Dig. p. 431, § 366. A plan, picture, or other representation produced by the art of photography, is admissible on like principles, if verified as a true and accurate representation. It is, in fact, but a scientific reproduction of a *fac simile* of the original object in nature, by a mechanical art which is every day advancing towards perfection. The competency of such evidence was settled in *Luke v. Calhoun Co.*, 52 Ala. 115, approving a like ruling in the case of *Udderzook v. Com.*, 76 Pa. St. 340, where a photograph of a person in life, shown to be a correct picture, was admitted in evidence for the purpose of aiding in the identification of a deceased person alleged to have been murdered. The case of *Ruloff v. People*, 45 N. Y. 213, supports the same principle. In the case of *Blair v. Pelham*, 118 Mass. 420, which was an action against a town to recover damages for injuries caused by a defect in a highway, the defendant was permitted to put in evidence a photograph of the place of the accident, on its verification by the photographer as a true representation. So in *Church v. City of Milwaukee*, 31 Wis. 512, an action for damages resulting to a lot-owner from a change in the grade of a street, a photograph of the premises shown to be correct was admitted "to aid the jury in arriving at a clear and accurate idea of the situation of the premises, and enable them to better understand how they were affected by the change in the grade." And *Cozzens v. Higgins*, 33 How. Pr. 436, decided by the New York court of appeals, is to the same effect. In an action of trespass against an adjoining proprietor, for the wrongful act of opening holes in the walls of the plaintiff's cellar, so as to render it untenable, by projecting into it heavy beams, a "photographic view" of the cellar was admitted in evidence as "an appropriate aid to the jury in applying the evidence." The case of *Dyson v. Railroad Co.*,

57 Conn. 10, 17 Atl. Rep. 137, is another authority directly in point, where, in an action for damages against a railroad company, a photographic view of the *locus in quo* of the accident was held to be admissible in evidence. The same ruling precisely was made in the case of *Archer v. Railroad Co.*, 13 N. E. Rep. 318, (decided in 1887, by the New York court of appeals.) We entertain no doubt as to the soundness of these rulings, and they fully support the action of the court in admitting in evidence the photograph of the wrecked train and surrounding locality in this case. 1 Whart. Ev. (3d Ed.) § 676; *Eborn v. Zimpelman*, 26 Amer. Rep. 319-321, note; *Marcy v. Barnes*, 16 Gray, 161; *Locke v. Railroad Co.*, 46 Iowa, 109.

2, 3. The question propounded to the witness Slaton, and his answer to it, tended to throw some light on the plaintiff's contention that the car containing the fertilizer was too heavily loaded; which was one of the grounds of negli-

gence imputed to the defendant as the proximate cause of the injury suffered by the plaintiff. This evidence was therefore relevant, and its admission free from error. The objection interposed, moreover, was general and undefined, failing to particularize any specified ground, and for this reason there was no error in disregarding it. *Dryer v. Lewis*, 57 Ala. 551; 3 Brick. Dig. p. 443, § 567.

4. The evidence tended to sustain the allegations of each of the counts in the complaint (the first and the third) upon which the merits of the case were tried before the jury. And, under the circumstances, we are of opinion that the questions of negligence by the defendant, and of contributory negligence by the plaintiff, were both properly left to the jury. *Railroad Co. v. Perry*, 87 Ala. 392, 6 South. Rep. 40. The objection taken to the panel of jurors was clearly without merit. We discover no error in the record, and the judgment must be affirmed.

GLENN v. ORR.

(2 S. E. 538, 96 N. C. 413.)

Supreme Court of North Carolina. May 27, 1887.

Appeal from superior court, Mecklenburgh county.

Action by John Glenn, trustee of the National Express & Transportation Company, against M. M. Orr, alleged to be shareholder of said company, to recover the sum of \$300, being the amount of a call or assessment upon the stock held by the defendant. The court having refused to admit the evidence referred to in the opinion, the plaintiff suffered a nonsuit and appealed.

D. G. Fowle, A. Jones, and W. Fleming, for plaintiff. W. P. Bynum, for defendant.

MERRIMON, J. It became material on the trial to prove the organization of the National Express & Transportation Company, and the appellant offered in evidence, for this and other purposes, "the records, books, and minutes" of that company, embracing what purported to be the proceedings in the organization of it under and in pursuance of its charter. The appellee objecting, the court held that these records were not evidence for such purpose, and the appellant assigns this ruling as error. It likewise became material to prove that the appellee was a subscriber for 10 shares of the capital stock of the company named, charged and credited to his account as a stockholder thereof, and the appellant offered in evidence for this purpose the same records, which purported to show that the appellee did subscribe and was a subscriber for the number of shares of stock mentioned; that he had paid \$50 on account of the same, and the balance of the money due therefor had not been paid; and that he was a stockholder of the company. The appellee objecting, the court declined to allow the records so offered to be put in evidence for such purpose, and the appellant assigns this rejection of the records as error. In view of these adverse rulings, the appellant suffered a judgment of nonsuit, and appealed to this court.

It was admitted on the trial that the books and records offered in evidence were those of the National Express & Transportation Company, and it must be taken, from such admission, as there is no suggestion to the contrary, that the proceedings entered in them, and the orders and statements therein made, are regular, and made by the proper clerk, secretary, or agent of the company, or some person authorized to make them. It must so appear before such records and books can be received as evidence for any purpose. The records and books, thus identified, were evidence—certainly *prima facie* evidence—of the organization and existence

of the company. They purport to set forth the proceedings of the organization, a list of the names of the stockholders, the number of shares of stock owned by each, when he subscribed for the same, the sum of money paid by each for his stock, and the sums due therefor remaining unpaid, and an account of its business transactions.

In *Turnpike Co. v. McCarson*, 1 Dev. & B. 306, Chief Justice Ruffin said: "The case does not state the contents of the subscription and corporation books that were produced, and therefore we cannot say positively of what they were evidence. We suppose them to be entries of such acts as the charter prescribes, as no deviation is specified. If so, these documents, when identified, were not only evidence, but complete evidence, of the organization and existence of the corporation." The rule is so stated in *Angell & Ames on Corporations*, §§ 513, 514, 679; and so, also, *Turnpike Co. v. McKean*, 10 Johns. 154; *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578; *Owings v. Speed*, 5 Wheat. 420.

The books of the corporation offered in evidence, including the stock book, purported to contain, as we have seen, a list of all its stockholders, the number of shares of stock owned by each, the sum of money paid, and the balance still due from each on account of his stock; and the name of the appellee appears as a stockholder, and his account is stated showing a balance due from him for his stock. These books were competent evidence to prove that the appellee was a stockholder, and the state of his account as such in respect to his stock. It was so decided in the very similar case of *Turnbull v. Payson*, 95 U. S. 418, in which the court say: "Where the name of an individual appears in the stock book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock in a case where there is nothing to rebut that presumption; and, in an action against him as stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant." *Hamilton Plank-Road Co. v. Rice*, 7 Barb. 157; *Coffin v. Collins*, 17 Me. 440; *Whitman v. Granite Church*, 24 Me. 236; *Wood v. Railroad*, 32 Ga. 273; *Hoagland v. Bell*, 36 Barb. 57; *Mor. Corp.* § 270. The rule of evidence underlying this and similar decisions seems to be founded in convenience, and to rest upon the further ground that corporations in this country are the creatures of statute, with prescribed rights and powers, subject, to an important extent, to public control and supervision, and are therefore to exercise their powers as allowed and required by law, and to keep their records accordingly and truly. Such presumption may, of course, be rebutted by any competent evidence. This rule might, in possible cases, work injury to a party, but this is not probable, and, thus objected to, it has

the less weight, as generally every litigant has the right to testify in his own behalf. Turnpike Co. v. McKean, *supra*; Owings v. Speed, *supra*.

There is error, and the appellant is entitled to have a new trial. To that end let this opinion be certified to the superior court according to law. It is so ordered.

HOWARD v. GLENN.

(11 S. E. 610.)

Supreme Court of Georgia. April 21, 1890.

Error from superior court, Richmond county; RONEY, Judge.

F. H. Miller, for plaintiff in error. *Calhoun, King & Spalding*, and *C. H. Cohen*, for defendant in error.

BLANDFORD, J. At the appearance term the defendant filed a motion to dismiss the plaintiff's declaration on the ground that he failed to annex a copy of the written terms of subscription, and copies of the proceedings referred to in his declaration, with a copy of the call for the enforcement of which this action was brought. Subject to this motion, defendant pleaded: (1) That the National Express & Transportation Company was not on the 14th day of December, 1880, a body politic and corporate, as alleged in the plaintiff's declaration; (2) that the plaintiff is not a legally appointed trustee, and authorized to institute this action by virtue of his appointment; (3) that, if the defendant ever subscribed to stock, it was to the National Express Company, whose charter was amended without the knowledge or sanction of this defendant, (4, 5, 6) the statute of limitations. When this case came on to be tried, the court ordered these pleas stricken, and overruled the motion to dismiss the plaintiff's declaration.

1. In our opinion, the plaintiff's declaration set forth a cause of action against the defendant. The declaration substantially alleged that Howard was a subscriber to the National Express & Transportation Company for 15 shares of its capital stock, amounting to the sum of \$1,500; that this company, having become insolvent, made an assignment to certain persons as trustees; that certain creditors of this company filed a bill in the city court of Richmond, upon which there was a decree rendered, praying that the defendant in error, Glenn, should be appointed a trustee with authority to sue and collect from the corporators of the National Express & Transportation Company a certain assessment and call made upon them by the decree of that court. The officers or persons representing the National Express & Transportation Company were made parties defendant to that bill. We think, so far as Howard had any interest in this company, that he was represented by the corporation in that case, and that he was bound by the decree rendered in the same, (it being rendered by a court of competent jurisdiction,) notwithstanding that Howard may at the time have been a citizen of Georgia, and may not have been served with any process in that case. So we think the court did right to overrule the demurrer of defendant to the plaintiff's declaration. We think, also, that the pleas first, second, and third and fourth, fifth, and sixth were properly dismissed on demurrer by the court. We think that Glenn was duly appointed a trustee, and as such had a right to bring this suit; and that if the defendant subscribed to stock in the National Express Company, although the

charter may have been amended without his knowledge or sanction, so as to make it the National Express & Transportation Company, this did not relieve the defendant from any liability to pay up his unpaid stock, this not being such a material alteration of the charter as would relieve the defendant, Howard; and this court held in 81 Ga. 383, 8 S. E. Rep. 636, in this same case, that the statute of limitations did not apply to the same.

2. We think there was no error of the court in holding that the first plea of the defendant in this case was insufficient, in that it alleged that the action brought by the plaintiff did not set forth the outstanding creditors for whose benefit the same was instituted, the decree of the court in Virginia having set forth such creditors; and we hold that that decree was binding on the defendant, Howard, as to all matters therein contained, if he was a corporator in the National Express & Transportation Company.

3. It is alleged as error that the court erred in striking the second plea of defendant; that the decree of the chancery court of the city of Richmond of December 14, 1880, set forth in the petition, was not such a contract of record as was binding upon him personally for any purpose, in that the court was without jurisdiction over him as a resident citizen of the estate of Georgia, who was never served with process therein, who never appeared, or had notice thereof, until the institution of this suit. We think that when the corporation was sued at the instance of creditors, and was duly served. Howard was bound as a corporator by any proceedings in that case, and there was no error in striking the second plea.

4. We think the third plea was also properly stricken by the court, inasmuch as we think that whatever fraud may have been committed by the corporation would not operate to defeat an action by the creditors of the corporation, however it might be as between the corporation and a corporator. Persons who gave credit to this corporation would not be bound by any fraud between the corporation and the corporators. As between the corporation and a corporator, such defense may or may not have been good; but, as between a trustee appointed by a court to bring suit and collect the unpaid subscriptions of a corporator, no such defense could be made.

5. We think the fourth plea was properly stricken on demurrer, in this: that while it alleged the decree of the court in this case in Virginia, to the effect that if the stockholders should pay a certain percent, upon their subscriptions within a certain time, this would be sufficient to pay off the indebtedness of the company, the plea did not allege that there was any tender or offer on the part of defendant to pay under that decree, within the time therein prescribed, the amount prescribed to be paid. To avail himself of that decree, the defendant should have paid, or have offered to pay, the amount specified in the decree. No such allegation appears in this plea, and therefore it was properly stricken.

6. It is complained that the court erred in striking the fifth plea, or so much thereof as alleged that the subscription was induced by fraud, and is void for false and fraudulent representations made, and for the fraudulent suppression of material facts concerning said company, the court allowing the words to stand in said plea; that defendant at no time became a subscriber to the National Express & Transportation Company; that he did sign a paper subscribing to the National Express Company for 15 shares of the capital stock. Whether Howard became a stockholder in this company by subscription which was induced by fraud practiced upon him or not, if he did become a stockholder in said company, he is liable to the creditors of the company for so much of his unpaid stock as might be necessary to pay the company's debts, taken in connection with the other corporators of the company; and whether fraud was practiced upon him or not would make no difference as to the creditors. It would be a question between him and the corporation, with which the creditors had nothing to do. So we think the court committed no error in striking that portion of the fifth plea complained of. We think the sixth plea was properly stricken, for the reasons stated in justification of the court in striking a portion of the fifth plea.

7. In the seventh plea, which was also stricken by the court, it is alleged that the plaintiff had settled with and released from liability several stockholders under said decree, and defendant contends that this is equivalent to a release of himself. We think the court properly struck this plea. The defendant is bound to the creditors upon his subscription to the capital stock of this company, and whether other stockholders were released or not is a matter with which he has no concern, unless this action on the part of the creditors or their agent increased his liability.

8. For the same reason we think the court was right in striking the eighth plea, which is complained of, and also the ninth plea. When the plaintiff below showed that he had been duly appointed a trustee by a court having competent jurisdiction, to recover of the stockholders of this company their unpaid subscriptions, for the purpose of paying off the creditors of the corporation, and when the plaintiff showed that defendant was a stockholder and had subscribed so many shares to the capital stock of this company, and that the court had made an assessment upon the stockholders for a certain per cent. upon the stock subscribed, and authorized him to sue and collect the same, we think he made out a case which entitled him to recover, notwithstanding any fraud which might have been practiced upon the stockholder to procure his subscription to the capital stock of this company by the corporation or its agents. Fraud thus practiced upon the subscriber was a matter which did not affect the creditors of the corporation. The great question in this case is whether the defendant, Howard, who is now the plaintiff in error, was a corporator and a subscriber to the capital stock of this company. He admits by his

plea that he did subscribe to 15 shares of the capital stock of the National Express Company; and it was shown by the evidence introduced by the plaintiff in the court below that the National Express Company and the National Express & Transportation Company were one and the same. A mere change in the name of a corporation we do not think makes any material difference; clearly not such a difference as would relieve a subscriber from liability to pay for stock subscribed by him.

9. It is insisted that the court erred in allowing the books of the corporation to be put in evidence for the purpose of showing that the defendant did subscribe to 15 shares of stock, and to show, also, certain other things therein contained. When it was shown that the defendant was a stockholder in the company, then the books of the company were admissible in evidence against him. But, when this fact is not shown, we are of the opinion that the books of the company would not be admissible in evidence against him. In this case, however, it was admitted by the plaintiff in error that he did subscribe to so many shares of stock in the National Express Company; so, when it was proven that the National Express Company and the National Express & Transportation Company were one and the same corporation, we think the books were admissible in evidence, not only to show that Howard was a stockholder, the number of shares and the value thereof he subscribed for, but to show any other transaction that had taken place between him and this company. We are aware that it has been held that the books of a corporation are admissible to show *prima facie* that the defendant was a subscriber to the stock of the company, and was a stockholder therein; but while we do not think this ruling is correct, upon any reason or principle known to us, yet, under the facts of this case, we think the books were properly admitted in evidence. We know of no decision, however, which shows upon principle that such books are admissible without some special circumstance. We do not think that the case of *Turnbull v. Payson*, 95 U. S. 418,—a decision by Judge CLIFFORD to the effect that the books of a corporation are admissible in evidence to show that a person is a stockholder,—is correct. No reason is assigned in that decision, and none has been assigned in any decision which we have been able to find in either North Carolina or Alabama. But we think, under the facts of this case, where the defendant admitted that he was a subscriber to the stock of the National Express Company, and where it was shown that the National Express Company and the National Express & Transportation Company were one and the same thing, that the books were properly admitted. We think, furthermore, that when the subscription list was tendered, and admitted in evidence by the court below, the plaintiff in error had a right to show that he did not subscribe to this list, and therefore think the court committed error in refusing to allow him to make such proof; yet we

do not think this is reversible error, inasmuch as it appears from the record, without more, that the plaintiff had a right to recover in this case. So, upon considering this case, we are of the opinion that there was no material error committed by the court below, and that the finding of the jury was right, under the facts in proof.

10. It is contended by the plaintiff in error that the admission in the fifth plea, to the effect that he had never subscribed to the National Express & Transportation Company, but that he did subscribe 15 shares to the National Express Company, could not be used as an admission against him upon the trial of any other plea than that; and the case of *Glenn v. Sumner*, 132 U. S. 156, 10 Sup. Ct. Rep. 41, is cited as authority to sustain this position. In the present case the main issue was whether the plaintiff in error was a subscriber to the stock of the National Express & Transportation Company. It was affirmatively alleged in the declaration that he was; and, if he was such subscriber, his liability under the facts of the case was clear and unmistakable. We think this allegation in the plaintiff's declaration that he was such subscriber called forth from him a clear and explicit denial of the same by a plea of *non est factum*, as was strongly hinted at by the supreme court of this state in the case of *Thornton v. Lane*, 11

Ga. 489. This was the main issue in the case, and, without a determination of the same against the plaintiff, the plaintiff was entitled to judgment. So we think that a plea which denies that the defendant was a subscriber to this company, but which at the same time admits that he was a subscriber to another company, (which two companies were one and the same,) was evidence against the defendant, (now plaintiff in error,) and might be so used as an admission. While we admit that, under the laws of this state, a defendant may file as many contradictory pleas as he thinks proper, yet, if one of those pleas bears on the main issue in the case, and there be an admission in the same by the defendant which is calculated to damage his cause, that admission may be used in evidence against him. In fact, the only issue to be determined by the jury in this case was whether Howard became a subscriber and stockholder in this company, and any plea which bore upon that issue, and which contained admissions by the defendant, could be used against him. So we think that in the case of *Glenn v. Sumner*, *supra*, what was said by the judge in delivering the opinion therein, to the effect that statements made for the purpose of presenting the issue to which they relate are not evidence upon any other issue in the same record, does not apply to this case. Judgment affirmed.

COMMONWEALTH v. O'BRIEN (two cases).

(25 N. E. 834, 152 Mass. 495.)

Supreme Judicial Court of Massachusetts. Essex. Nov. 25, 1890.

Exceptions from superior court, Essex county; EDGAR J. SHERMAN, Judge.

These were complaints against defendant, Richard O'Brien, for the illegal keeping of intoxicating liquors on the 2d day of June, 1890. Appealed from the police court of Haverhill. A motion to dismiss was filed in the superior court before a jury was sworn to try the case, on the ground that the complaint and warrant were not sworn to or certified or issued according to law. At the trial, defendant not having waived his said motion, or the objections therein set forth, offered, in support of said motion and objections, the testimony of Edward B. George, clerk of the police court of Haverhill, to explain the record, to rebut the presumption that the

receiving of the complaint, swearing to the same, and issuing of the warrant, were done in court, or when the court was in session, and to show that when the complaint was received and sworn to and the warrant issued the court was not in session. The court refused to admit the evidence and overruled the motion, and defendant excepted. After trial on the merits, the jury returned a verdict of guilty.

A. J. Waterman, Atty. Gen., for the Commonwealth. Horace I. Bartlett, for defendant.

KNOWLTON, J. In each of these cases, the complaint purported to have been properly received and sworn to before the police court of Haverhill, and the warrant to have been properly issued by the court. The motion to dismiss was rightly overruled. The oral evidence offered to impeach the record was incompetent. Com. v. Intoxicating Liquors, 135 Mass. 519; Kelley v. Dresser, 11 Allen, 31. Exceptions overruled.

NESBIT v. INDEPENDENT DISTRICT OF RIVERSIDE.

(12 Sup. Ct. 746, 144 U. S. 610.)

Supreme Court of the United States. April 18, 1892.

In error to the circuit court of the United States for the Northern district of Iowa.

Action by Eleanor Nesbit against the independent district of Riverside to recover on certain bonds issued by the district. Judgment for defendant. Plaintiff brings error. Affirmed.

Statement by Mr. Justice BREWER:

This was an action on five bonds purporting to have been issued by the school district defendant. The case was tried by the court without a jury. Special findings of facts were made, of which the following are the only ones material to the questions presented:

"(2) The value of the taxable property within the boundaries of the independent district, as shown by the state and county tax lists, was for the year 1872 forty-one thousand four hundred and twenty-six dollars, and for the year 1873 sixty-eight thousand three hundred and seven dollars.

"(3) That on the 26th and 27th days of March, 1873, the indebtedness of said independent district, exclusive of the bonds declared on in this action, exceeded the sum of thirty-five hundred dollars.

"(4) That the bonds sued on in this action bear date March 27, 1873, maturing ten years thereafter, are five in number, for five hundred dollars each, or \$2,500.00 in the aggregate, exclusive of interest, are numbered 14, 15, 16, 17, and 18, and that the signatures thereon are the genuine signatures of the officers of the district purporting to sign the same, and that said bonds, with the accrued interest, now amount to the sum of five thousand six hundred and ninety-five dollars, which bonds and interest coupons were produced in evidence by plaintiff. The said bonds and interest coupons are in all respects alike except as to number, and each coupon refers to the number of the bond to which it belongs and to said act under which it was issued. All of said bonds contain the following provision in the body thereof: This bond is issued by the board of directors of said independent school district under the provisions of chapter 98 of the Acts of the Twelfth General Assembly of the state of Iowa, and in conformity with a resolution of said board dated the 26th day of March, 1873. A copy of the act referred to is printed on the back of the bonds. The exhibits attached to plaintiff's petition are correct copies of said bonds and coupons.

"(4½) That all of said five bonds and the coupons attached belong to the same series, and were issued at the same time, under the same circumstances, and part of the same transaction.

"(5) That the plaintiff, who is a citizen of Great Britain, bought these bonds, and all the interest coupons belonging thereto, as an investment from one Henry Hutchinson on the 20th day of December, 1877, paying him therefor the sum of two thousand dollars; that said plaintiff, when she made such purchase, had no other knowledge concerning the bonds, or of the facts connected with their issuance, than she was chargeable with from the bonds themselves, and from the provisions of the constitution and laws of the state of Iowa.

"(6) That said bonds were issued without consideration.

"(7) That plaintiff brought suit in the United States circuit court at Des Moines, Iowa, against the said independent district of Riverside upon certain of the interest coupons belonging to the bonds Nos. 14 and 15, being two of the bonds included in the present action, and in the petition in that cause filed the plaintiff averred that she was the owner of the two bonds Nos. 14 and 15, and the coupons thereto attached, and asked judgment upon the six coupons then due and unpaid. To this petition the defendant answered that at the time the bonds were issued the indebtedness of the district exceeded five per cent. of the taxable property of the district, as shown by the state and county tax lists, and that the bonds were therefore void, under the provision of the constitution of the state of Iowa; that no legal or proper election upon the question of issuing the bonds was held; that the bonds were issued under the pretense of building a schoolhouse with the proceeds thereof, but the same has not been built, nor was it intended that it should be built; that the district received no consideration for the bonds, and that the same are fraudulent and void; that plaintiff is not a bona fide holder of said bonds.

"The case was tried to the court, and judgment was rendered in favor of plaintiff for the full amount of the six coupons declared on in that cause. It is shown by evidence aliunde that the five bonds bought by plaintiff were in possession of plaintiff's counsel at the trial of the action at Des Moines, and that bonds Nos. 14 and 15 were actually produced and exhibited to the court at such trial, and offered in evidence. It is not shown that at such trial the fact that plaintiff had bought and was the owner of bonds Nos. 16, 17, and 18 was made known to the court. The judgment entry in said cause shows that on that trial it appeared from the evidence that when said bonds Nos. 14 and 15 were issued the indebtedness of the district, exclusive of these bonds, exceeded the constitutional limitation of five per cent.; that the judges trying said cause were divided in opinion upon the question whether the recitals in the bond estopped the defendant from showing this fact against plaintiff, and certified a division of opinion on this question, judgment being rendered in favor of

plaintiff. It does not appear that the cause was taken to the supreme court upon the question certified.

"(8) Under the statutes of Iowa, in force in 1872 and 1873, regulating the assessment of property for the purpose of state and county taxation, the lists thereof could not be computed before the month of August, and in March, 1873, when these bonds were issued, the last computed tax list was for the year 1872."

Upon these facts judgment was entered in favor of the defendant, (25 Fed. 635,) to reverse which judgment this writ of error was sued out.

W. Willoughby, for plaintiff in error.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

Article 11, § 3, of the constitution of Iowa of 1857, ordains that "no county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness." Under that section, the limit of indebtedness which the district could incur at the date of the issue of these bonds was \$2,071.30. It was already indebted in a sum exceeding \$3,500, and the five bonds of themselves aggregated \$2,500, or nearly \$500 more than the amount of debt the district could lawfully create. Aside, therefore, from the fact that they were issued without consideration, they were invalid by reason of the constitutional provision, and created no obligation against the district. They were issued at the same time, and as one transaction, and were purchased by plaintiff together and in one purchase. If not charged with knowledge of the prior indebtedness, she was with the fact that, independent of such indebtedness, these bonds alone were an overissue, and beyond the power of the district; for she was bound to take notice of the value of taxable property within the district, as shown by the tax list. *Buchanan v. Litchfield*, 102 U. S. 278; *Bank v. Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. 254; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315. In the first of those cases, on page 289, it is said that "the purchaser of the bonds was certainly bound to take notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873;" and in the last, on page 95, that "the amount of the bonds issued was known. It is stated in the recital itself. It was \$87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable

property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers." So when the plaintiff purchased these bonds she knew, or at least was chargeable with knowledge of the fact, that they were unlawfully issued, and created no obligation against the district. She could not, therefore, claim to be a bona fide purchaser, no matter what recitals appeared on the face of the instrument.

But the question which is most earnestly pressed upon our attention is the estoppel which is alleged to have been created by the judgment against the district in the United States circuit court at Des Moines, upon coupons detached from the two bonds numbered 14 and 15. Is this a case of estoppel by judgment? The law in respect to such estoppel was fully considered and determined by this court in the case of *Cromwell v. County of Sac*, 94 U. S. 351. It was there decided that when the second suit is upon the same cause of action, and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first action; but when the second suit is upon a different cause of action, though between the same parties, the judgment in the former action operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined.

Now, the present suit is on causes of action different from those presented in the suit at Des Moines. Bonds 16, 17, and 18 were not presented or known in that suit; and while bonds 14 and 15 were presented, alleged to be the property of plaintiff, and judgment asked upon six coupons attached thereto, yet the cause of action on the six coupons is distinct and separate from that upon the bonds or the other coupons. Each matured coupon is a separable promise, and gives rise to a separate cause of action. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons, and upon each a distinct and separate action be maintained. So, while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond as though the two promises were placed in different instruments, upon different paper.

By the rule laid down in *Cromwell v. County of Sac*, the judgment in the suit at Des Moines is conclusive in this case only as to the matters actually litigated and determined. What were they? The defense pleaded was this: That at the time the bonds were issued the indebtedness exceeded 5 per cent.,

and the bonds were therefore void; that the district received no consideration; and that the plaintiff was not a bona fide holder. The judgment entry shows that it appeared from the evidence that the indebtedness at the time the bonds were issued exceeded the constitutional limitation of 5 per cent.; but that it was adjudged that the recitals in the bonds estopped the defendant from showing this fact against the plaintiff. In other words, that which was determined was the effect of the recitals. But this case does not turn upon that question at all, and nothing was determined here antagonistic to the adjudication there. An additional fact, that of notice from the amount of the bonds purchased, was proved.

The effect of recitals in municipal bonds is like that given to words of negotiability in a promissory note. They simply relieve the paper in the hands of a bona fide holder from the burden of defenses other than the lack of power, growing out of the original issue of the paper, and available as against the immediate payee. Suppose two negotiable promissory notes, issued at the same time, and as a part of the same transaction. In a suit on the first, brought by a purchaser before maturity, the maker proves facts constituting a defense as against the payee, but fails to bring home notice of these facts to the holder before his purchase. The judgment must go in favor of the holder, for the words of negotiability in the note preclude the maker from such a defense as against him. In a suit on the second of such notes, may not the maker couple proof of notice to the holder with that of the original invalidity of the note, and thus establish a complete defense against the holder? Is he precluded by the first judgment, and his failure in that to prove notice to the holder? That is precisely this case. In the suit at Des Moines no notice to the holder was shown. The recitals cut off the defense pleaded of original invalidity. In this action notice is proved, and an additional fact is put into the case, which makes a new question. The effect of recital is one thing; that of recitals coupled with notice is another. The one question was litigated and determined in the Des Moines

suit; the other is presented here. Surely an adjudication as to the effect of one fact alone does not preclude in the second suit an inquiry and determination as to the effect of that fact in conjunction with others. Infancy is pleaded in an action on a contract, and an adjudication is made establishing it as a defense. In a second suit between the same parties on a different cause of action, though created at the same time, may not the plaintiff prove ratification after majority? Many reasons may induce or prevent the introduction into the first case of all the facts. It was well said in *Cromwell v. County of Sac* (page 356) that: "Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount, or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action, other demands arising out of the same transaction."

This case may be looked at in another light. The defense pleaded in the Des Moines suit was that at the time of the issue of the two bonds then disclosed there was a prior indebtedness of the district exceeding the constitutional limitation, and that defense was the one adjudged to be precluded by the recitals. Here an additional defense is that the five bonds in suit themselves created an overissue. That question was not presented in the Des Moines suit, and could not have been adjudicated. It is presented for the first time in this case. It is of itself a valid defense, irrespective of prior indebtedness. So we have in this case a new question not presented in the Des Moines suit, the existence of facts never called to the attention of the court in that case, which of themselves create a perfect defense.

We see no error in the judgment, and it is affirmed.

Mr. Justice HURLAN dissents.

FRANKLIN COUNTY v. GERMAN SAV. BANK.

(12 Sup. Ct. 147, 142 U. S. 93.)

Supreme Court of the United States. Dec. 14, 1891.

In error to the circuit court of the United States for the Southern district of Illinois.

Action by the German Savings Bank against the county of Franklin, Ill., on the coupons of certain railroad aid bonds. Jury waived, and trial by the court. Judgment for plaintiff. Defendant brings error. Affirmed.

The facts of the case fully appear in the following statement by Mr. Justice BROWN:

This was an action by the German Savings Bank of Davenport, Iowa, upon 128 coupons cut from bonds issued by the county of Franklin in payment of its subscription to the capital stock of the Belleville & Eldorado Railroad Company. The allegation of the declaration was that such bonds had been issued on the 10th day of November, 1877, by the said defendant, "being thereunto duly authorized by an affirmative vote of the legal voters of said county, as required by law." There was a further averment that plaintiff became the owner of 20 of these bonds, whose numbers were given, from which the coupons in suit had been cut. To this declaration a plea of non assumpsit, and a replication thereto, were filed. A jury being waived, the cause was tried by the court, which found in favor of the plaintiff, and a judgment was rendered on February 4, 1891, in its favor, for the sum of \$5,120, damages and costs. The bonds purported on their face to have been "issued under the provisions of an act of the general assembly of the state of Illinois entitled, 'An act to incorporate the Belleville and Eldorado Railroad Company,' approved February 22nd, 1861, authorizing subscriptions to the capital stock of said railroad, and in accordance with the majority of votes cast at an election held in said county on the 11th day of September, 1869, in conformity with the provisions of said act."

Upon the trial of the case, the plaintiff bank, after presenting the bonds and coupons set forth in the declaration, put in evidence the record of a suit in equity, begun in the same court, and carried to a final decree on July 3, 1883. The bill was originally filed by the county of Franklin in the circuit court of Franklin county, Ill., on the 4th day of August, 1880, against the Belleville & Eldorado Railroad Company, the clerk, sheriff, and collector of said county, the auditor of public accounts of the state of Illinois, the state treasurer of Illinois, several private individuals, and the unknown holders of bonds issued by the said Franklin county in aid of the said railroad company. The bill alleged the issuing by the county of \$150,000 of its bonds, dated November 13, 1877, to the Belleville & Eldo-

rado Railroad Company; \$100,000 of which were subscribed and issued under the act of the general assembly of Illinois entitled, "An act to incorporate the Belleville and Eldorado Railroad Company," approved February 22, 1861, authorizing a subscription to the capital stock of said company, and \$50,000 of which were subscribed and issued under an act of the general assembly entitled, "An act to authorize cities and counties to subscribe stock to railroads," approved November 6, 1849. The bill alleged that both classes of bonds were subscribed and issued in pursuance of the vote of the people of the county at an election held the 11th day of September, 1869, and that the order of the county court submitting the proposal to the voters named certain conditions to be complied with before the bonds should be issued, one of which was that the railroad should be commenced in the county of Franklin within nine months from the date of the election, and completed through the county by the 1st day of June, 1872. The bill further alleged that the orders submitting the question to the voters were never complied with, and particularly that the road was not completed within the time provided; that all of the orders and resolutions of the county court and the board of supervisors subscribing and attempting to subscribe, stock to said railroad company, were in conflict with the constitution of the state, and were void; that the state auditor had no right to levy taxes for the purpose of paying the principal or interest of said bonds; that the state treasurer had no right to receive or pay out the same; and that the act to provide for paying railroad debts by counties, approved April 16, 1869, was unconstitutional, contrary to public policy, and void. The bill prayed an injunction restraining the officers of the state from collecting or paying out taxes in liquidation of said bonds, and that the individual defendants and unknown holders of the bonds be enjoined from suing the county upon any of the coupons attached to such bonds.

A temporary writ of injunction was issued as prayed. Service by publication was made upon the unknown holders of the bonds. Upon the 27th day of October, 1880, a decree was taken by default. At the October term, 1881, the German Savings Bank appeared in the cause, had the decree opened, and removed the case to the circuit court of the United States for the Southern district of Illinois, to which it was submitted upon proofs taken, and upon a stipulation that the defendant was the bona fide holder of the bonds set up in its answer, and purchased the same, for value, without notice of any defense. The answer of the bank, which was also adopted by other defendants intervening for their own interests, put in issue every material averment of the bill, and prayed that, as to the bonds and cou-

pons held by it, the bill might be dismissed for want of equity, and the injunction dissolved. On July 3, 1883, a decree was entered, declaring that all bonds involved in the case, and purporting on their face to have been issued under the provisions of the railroad act of November 6, 1849, were issued without authority of law, and were therefore void, and decreeing that as to the holders of such bonds the injunction be made perpetual. The decree further provided that, as to the specific bonds designated by their numbers, and among others the bonds belonging to the German Savings Bank, "purporting on their face to be of the series issued under the charter of the said Belleville & Eldorado Railroad Company, approved February 22, 1861, the court doth decree in favor of said defendants, the said several respective holders thereof, and that the said several bonds, and the coupons thereof, are valid and legal obligations against the county of Franklin; and as to said last-mentioned series of said bonds and coupons thereunto attached, as held as aforesaid, the court doth decree that the injunction issued in this cause be dissolved, and the complainant's bill be dismissed for want of equity."

The German Savings Bank in June, 1885, appealed from so much of this decree as adjudged that nine bonds, which had been issued under the act of 1849, and were held by the bank, were void, and upon such appeal this court affirmed the decree of the circuit court. *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159. The county of Franklin, however, did not appeal from the decree establishing the validity of the bonds issued under the act of 1861.

After the plaintiff had put in the said record, decree, and mandate of this court in the equity case, it introduced in evidence the eighteen bonds which, with the coupons thereof, had been decreed to be valid and legal obligations against the county, and also put in evidence coupons cut from two other bonds which had also been adjudged to be valid. The defendant introduced no evidence, but claimed that the evidence contained in the record introduced by the plaintiff showed that the bonds and coupons therefrom, upon which this action was brought, were invalid. The plaintiff contended that the validity of said bonds and coupons had been established in the said equity case, and that the question was res adjudicata; and the court so decided. To reverse the judgment of the circuit court in this behalf, this writ of error was sued out.

D. M. Browning, for plaintiff in error. E. E. Cook and S. P. Wheeler, for defendant in error.

Mr. Justice BROWN, after stating the facts as above, delivered the opinion of the court.

As both parties claim an estoppel by virtue of the decree in the equity suit between the parties to this suit, it only becomes necessary to consider the effect of this decree. It contains two separate and distinct findings: First. So far as the nine bonds held by the German Savings Bank, and issued under the act of November 6, 1849, were concerned, the decree pronounced them to be void; and as to them the injunction was made perpetual. From this part of the decree the bank appealed to this court, by which the decree was affirmed. 128 U. S. 526, 9 Sup. Ct. 159. Second. As to the eighteen bonds issued under the act of 1861, and the coupons cut from two other bonds issued under the same act, also held by the German Savings Bank, and purporting on their face to be of the series issued under the charter of said Belleville & Eldorado Railroad Company, approved February 22, 1861, the decree adjudged in favor of the defendant bank, and that the said several bonds, and the coupons thereof, were legal and valid obligations against the county of Franklin; and as to this series the injunction was dissolved and the complainant's bill dismissed. No appeal was taken from this part of the decree by the county of Franklin, but it now insists that these bonds are void for the same reasons that the bonds issued under the act of November 6, 1849, were adjudged to be void, namely, because both series were issued pursuant to the same vote, and subject to the same conditions.

The record of the equity suit does not show clearly the ground upon which the court based its distinction between the two classes of bonds; nor is it necessary to be ascertained here. It is sufficient for the purposes of this suit to know that the validity of these bonds was directly put in issue by the pleadings, and determined adversely to the county. The plaintiff alleged in its bill that these bonds were invalid by reason of the non-compliance of the road with certain conditions precedent upon which they were issued, setting up with great particularity all the proceedings prior to the issue of the bonds; reciting the laws under which they were claimed to have been authorized; and demanding their cancellation and surrender upon the ground that the acts of the county officers were unauthorized and void, and the laws under which they were issued unconstitutional. The entire question of their validity was presented and tried upon the merits, and the court could not have dismissed the bill as to these bonds without holding that they were valid, and the further finding that the several bonds and coupons thereof "are valid and legal obligations" added nothing to the force of the decree dismissing the bill.

The defendant's position in this connection is that as the entire record, taken together, shows that these bonds were void,

this court ought not to treat the decree of the court below, adjudging them to be valid, as *res adjudicata*. It is true that there are certain authorities to the effect that in the case of deeds, if the truth plainly appears on the face of the deed, there is, generally speaking, no estoppel, meaning simply, as stated by Mr. Bigelow (*Bigelow, Estop.* 351,) "that all parts of the deed are to be construed together, and that if an allegation in the deed which alone would work an estoppel upon the parties is explained in another part of the deed, or perhaps another deed to which reference is made for the purpose, there is ordinarily no estoppel." Lord Coke also states certain exceptions to the conclusive effect of records, one of these being, "where the truth appears in the same record, as where the defendant is sued by the wrong name, and enters into a bail-bond prout the writ, as he must, and then put in bail by his right name, he who was arrested is not estopped from pleading in abatement; or where the record shows that the judgment relied on as an estoppel has been reversed in error." But we know of no case which goes to the extent of holding that, where a court having complete jurisdiction of the case has pronounced a decree upon a certain issue, such issue may be retried in a collateral action, even although the evidence upon which the case is heard is sent up with the record. If this were possible, then in every such case where a judgment or decree is pleaded by way of estoppel, and the record shows the evidence upon which it was rendered, the court in which the estoppel was pleaded would have the power to retry the case, and determine whether a different judgment ought not to have been rendered. The case of *Brownsville v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327, has perhaps gone as far in the direction indicated by the defendant as any case reported in the books; but it is far from being an authority for the position assumed here. That was a petition for a mandamus to enforce the collection of judgments of a circuit court upon certain

bonds which this court had held to be invalid. The court denied the application of the relator upon the ground that, in his pleadings, he did not rely exclusively upon the judgments, but opened the facts which attended the judgments for the purpose of counting upon a certain act of the legislature as furnishing the remedy which he sought, and that by so doing he, in effect, asked the court to order the levy of a tax to pay the coupons, and relied upon the judgments principally as creating an estoppel of a denial of the power to do so. "Thus invited," said the chief justice, "to look through the judgments to the alleged contracts on which they are founded, and finding them invalid for want of power, must we nevertheless concede to the judgments themselves such effect, by way of estoppel, as to entitle the plaintiff *ex debito justitiæ*, to a writ commanding the levy of taxes under a statute which was not in existence when these bonds were issued? * * *

But where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever." This, however, does not touch the question of the binding effect of judgments when offered in evidence in a distinct and collateral action. We know of no case holding their probative effect to be anything else than conclusive. Had the plaintiff county desired further to test the validity of these bonds, it was its duty to have appealed from this decree, as did the bank with respect to the bonds which that court held to be invalid, when the question of the validity of both issues could have been heard and determined by this court.

There was no error in the finding of the court below, and its judgment must be affirmed.

GILMER v. MORRIS et al.

(46 Fed. 333.)

Circuit Court, M. D. Alabama. May, 1891.

In equity.

W. A. Gunter, H. C. Semple, and R. C. Brickell, for complainant. Tompkins & Troy, for respondents.

BRUCE, J. The facts appear in the opinion of the court. There was a previous bill between the same parties, which was dismissed by the supreme court of the United States upon a question of jurisdiction, as will be seen in case of Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289. A new bill was filed, and we have for consideration the sufficiency of the plea of *res adjudicata*, which was considered and determined in the former case, reported in 30 Fed. 476. The bill in this case and the plea are the same as in the former case, and the question has been again heard upon argument and brief of counsel on both sides. It is conceded that the original suit in the state court was brought to recover the same shares of stock for which this suit was brought; that it was by the same complainant against the same defendants; and, as the bill was dismissed absolutely and the decree affirmed on appeal, the defendants insist that the cause of action set up in the suit was adjudicated between the parties in the suit in the state court, and that the facts set up in the plea constitute a bar to the present suit. It will be observed from the record in the state court set up in the plea that the original bill after amendment, and as it stood when the trial was had, stated a pledge of 120 shares of stock in 1871 for \$6,000, the original cost of the same, and that this sum on the 30th day of March, 1871, was paid by a sale of one-half of the stock, and the remainder, 60 shares, was left to secure the balance of interest due to Morris. The bill did not allege acts of recognition on the part of Morris from that time to the filing of the bill in the state court, on the 7th day of July, 1884. The answer of the defendants admitted certain facts, but denied, by way of conclusion, the ownership of the stock by the complainant, and coupled with the answer as a part thereof, under the state practice, five different grounds of demurrer, viz.: (1) The facts alleged show that the demand is stale; (2) that it is barred by the statute of limitations; (3) the claimant has an adequate remedy at law; (4) the bill as amended makes an entirely different case from that made by the original bill; (5) there is no tender alleged in the bill of the amount admitted to be due, and said amount is not brought into court. Testimony was taken, and the case was submitted upon the pleadings and evidence without a previous ruling upon the demurrers, and the chancellor, in vacation, rendered a decree dismissing the

bill absolutely, which decree was on appeal affirmed by the supreme court of the state. 80 Ala. 78. The present bill states the original transaction of 1871 by way of inducement, and goes on to state a new and different pledge in 1875 of the same stock for other debts and for future advances which were from time to time made; and the question is, can the *res adjudicata* in the state court be held to apply to the case now made by the bill in this court?

If a new pledge of the same stock was made in 1875, and if by that it (the stock) was to be held as security for advances to be made, and which were afterwards made, then what is there in the record of the suit in the state court that operates as a bar to this suit? The opinion of the chancellor in the state court in the former suit shows that he rested his decision on the statute of limitations. His language is: "The statute of limitations is therefore a bar to the rights of the complainant in this cause." That was a point in the demurrer, and clearly the point decided was that the case made by the bill was barred by the statute of limitations. The issue was not whether there were acknowledgments that took the case out of the operation of the statute, or whether anything of that sort was proved or not, but only this: whether a case without such acknowledgment was made by the bill; and the question of a new and different pledge in 1875 was not before the court by any averment in the bill, and the judgment of the court was not invoked upon the case as it is now made in this court. The sustaining of the demurrer to the bill in the state court put the complainant out of court, and the suggestion of the counsel for the defendants is that he could have sought leave to amend his bill, and state the matter which he now claims took the case out of the operation of the statute of limitations. Conceding now that he might have done so, yet was he obliged to do so, and did he not have the option to confess the demurrer, and state new matter by way of amendment, or bring a new suit, and state new matter which would avoid the demurrer? The allowance of amendments in pleading was certainly not intended to prevent a party from filing a new suit, if he deems that the better course. Wells, Res. Adj. § 440; Shields v. Barrow, 17 How. 144; Marsh v. Masterton, 101 N. Y. 406, 5 N. E. 59.

The very idea of amendment has in it that of other and new matter, and the estoppel of the judgment of a court can operate only upon the case made and presented for the judgment of the court. If a party fails to state a case in his bill of complaint, and goes out of court on demurrer, the rule of *res adjudicata* operates as to the case made by his bill, and only as to that case. Gould v. Railroad Co., 91 U. S. 533; Bigelow, Estop. pp. 152-155. The question, then, is whether a defendant who has been defeated

on demurrer, because he has not made a case by the allegations in his bill, can bring a new suit to recover the same property from the same party, upon supplying the defects in his first bill.

The statement of the proposition would seem to carry its own answer, for how can the merits of a different cause, as set up in a bill in a second suit, be heard and decided on a different bill in a former suit, even when it is between the same parties and for the same property, or how, in such case, can the estoppel of a judgment in a former case operate as an estoppel in the second case? The judgment rendered in a cause must be held to the issues made by the pleadings, and the estoppel will operate only as to the issue, and whatever was necessarily involved in that issue. Presumption will never be indulged in favor of an estoppel beyond what is necessary to sustain the judgment rendered. *Russell v. Place*, 94 U. S. 606; *Bigelow, Estop.* pp. 152-155; *Barnes v. Railroad Co.*, 122 U. S. 14, 7 Sup. Ct. 1043; *Black, Judgm.* § 242. In *Aurora City v. West*, 7 Wall. 82, it is said: The essential conditions under which the exception of *res adjudicata* becomes applicable are "the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants." Can it be maintained that the cause of the demand in the case in this court is the identical cause of demand in the state court in the former suit? The theory of the bill in the state court seems to be a claim to the property upon an acknowledged pledge and trust relation subsisting between the parties in 1871. The theory of the bill in this case is that of another pledge at a subsequent

time, and with different conditions, not only for indebtedness then existing, but to exist,—that is, a continuing pledge, which in its nature was inconsistent with the running of the statute of limitations; and that in fact there was no act of repudiation of the pledge on the part of Morris prior to June, 1884. It is claimed, however, that the question is not simply what point was decided in the former suit, but what was necessarily involved in the issue in the former suit, and that, as the right to the stock in question was in issue, the matter now sought to be litigated is *res adjudicata* in the former suit. True, the same property is claimed here that was claimed in the former suit, but on a different ground, as we have seen; and as the judgment in the former suit was on demurrer to the bill and did not necessarily involve the question of property except as there stated, and as an estoppel must be certain to every intent, and cannot be extended, in the case of judgments, by implication, beyond matters essential to uphold them, the former judgment in this case cannot be held to conclude the right of property to the stock in question, which is involved alike in both cases. *Bigelow, Estop.* pp. 80, 81, 152, 154; *Moss v. Anglo-Egyptian, etc., Co.*, L. R. 1 Ch. 113-116.

The questions in this case have already been considered, and although upon a re-argument some views have been presented and some authorities cited in addition to what was presented in the former case, yet the conclusions reached do not differ from those expressed in former opinion, reported 30 Fed. 476, and it is not deemed necessary to go over the same ground again.

FREEMAN et al. v. ALDERSON et al.

(7 Sup. Ct. 165, 119 U. S. 185.)

Supreme Court of the United States. Nov. 29, 1886.

Error to the circuit court of the United States for the Northern district of Texas.

This was an action of trespass to try the title to certain land in Texas. It is the form in use to recover possession of real property in that state.

The plaintiffs claimed the land under a deed to their grantor, executed by the sheriff of McLennan county, in that state, upon a sale under an execution issued on a judgment in a state court for costs, rendered against one Henry Alderson, then owner of the property, but now deceased. The defendants asserted title to the land as heirs of Alderson, contending that the judgment under which the alleged sale was made, was void, because it was rendered against him without personal service of citation, or his appearance in the action.

The material facts of the case, as disclosed by the record, are, briefly, these: On the sixteenth of July, 1855, a tract of land comprising one-third of a league was patented by Texas to Alderson, who had been a soldier in its army. One undivided half of this tract was claimed by D. C. Freeman and G. R. Freeman, and they brought an action against him for their interest. The pleadings in that action are not set forth in the transcript, but from the record of the judgment therein, which was produced, we are informed that the defendant was a non-resident of the state, and that the citation to him was made by publication. There was no personal service upon him, nor did he appear in the action. The judgment, which was rendered on the first of October, 1858, was of a threefold character. It first adjudged that the plaintiffs recover one undivided half of the described tract. It then appointed commissioners to partition and divide the tract, and set apart, by metes and bounds, one-half thereof, according to quantity and quality, to the plaintiffs; and to make their report at the following term of the court. And, finally, it ordered that the plaintiffs have judgment against the defendant for all costs in the case, but stayed execution until the report of the commissioners should be returned and adopted, and a final decree entered.

At the following term the commissioners made a report showing that they had divided the tract into two equal parcels. The report was confirmed, and on the thirty-first of March, 1859, the court adjudged that the title to one of these parcels was divested from Alderson, and vested in the plaintiffs, the two Freemans, and that they recover all costs in that behalf against him, which were \$61.45, and that execution issue therefor. Execution therefor was issued to the sheriff of McLennan county on the thirtieth of

May directing him to make the amount out of "the goods, chattels, lands, and tenements" of the defendant. It was levied on the other half of the divided tract, which remained the defendant's property. On the fifth of July, 1859, this half was sold by the sheriff to one James E. Head for \$66.79, being the costs mentioned, and his fees for the levy and for his deed, which was executed to the purchaser. In September following, Head conveyed the premises to D. C. Freeman for the alleged consideration of \$178. Two of the defendants disclaimed having any interest. The other defendants, including Freeman, so far as their title is disclosed by the transcript, claimed under the sheriff's deed.

On the trial, the defendants, to show title out of the plaintiffs, offered in evidence the judgment for the costs, the execution issued thereon, and the sheriff's deed; to the introduction of which the plaintiffs objected, on the ground that the judgment for costs was a judgment in personam, and not in rem, and was rendered against the defendant, who was a non-resident of the state, without his appearance in the action, or personal service of citation upon him, but upon a citation by publication only, and therefore constituted no basis of title in the purchaser under the execution. The court sustained the objection, and excluded the documents from the jury; and the defendants excepted to the ruling. No other evidence of title being produced by the defendants, a verdict was found for the plaintiffs, and judgment in their favor was entered thereon; to review which the case is brought to this court on a writ of error.

M. F. Morris, for plaintiffs in error. E. H. Graham and L. W. Goodrich, for defendants in error.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court as follows:

Actions in rem, strictly considered, are proceedings against property alone treated as responsible for the claims asserted by the libelants or plaintiffs. The property itself is in such actions the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case.

There is, however, a large class of cases which are not strictly actions in rem, but are frequently spoken of as actions quasi in rem, because, though brought against persons, they only seek to subject certain prop-

erty of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff are in a general way thus designated. But they differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties.

The state has jurisdiction over property within its limits owned by non-residents, and may therefore subject it to the payment of demands against them of its own citizens. It is only in virtue of its jurisdiction over the property, as we said on a former occasion, that its tribunals can inquire into the non-resident's obligations to its own citizens; and the inquiry can then proceed only so far as may be necessary for the disposition of the property. If the non-resident possesses no property in the state, there is nothing upon which its tribunals can act. *Pennoyer v. Neff*, 95 U. S. 723. They cannot determine the validity of any demand beyond that which is satisfied by the property. For any further adjudication the defendant must be personally served with citation, or voluntarily appear in the action. The laws of the state have no operation outside of its territory, except so far as may be allowed by comity; its tribunals cannot send their citation beyond its limits, and require parties there domiciled to respond to proceedings against them; and publication of citation within the state cannot create any greater obligation upon them to appear. *Pennoyer v. Neff*, 95 U. S. 727. So, necessarily, such tribunals can have no jurisdiction to pass upon the obligations of non-residents, except to the extent and for the purpose mentioned.

This doctrine is clearly stated in *Cooper v. Reynolds*, 10 Wall. 308, where it became necessary to declare the effect of a personal action against an absent party without the jurisdiction of the court, and not served with process or voluntarily appearing in the action, and whose property was attached, and sought to be subjected to the payment of the demand of the resident plaintiff. After stating the general purpose of the action, and the inability to serve process upon the defendant, and the provision of law for attaching his property in such cases, the court, speaking by Mr. Justice Miller, said: "If the defendant appears, the cause becomes mainly a suit in personam, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be estab-

lished against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: First. The judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second. The court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court." 10 Wall. 318.

To this statement of the law it may be added what, indeed, is a conclusion from the doctrine, that while the costs of an action may properly be satisfied out of the property attached, or otherwise brought under the control of the court, no personal liability for them can be created against the absent or non-resident defendant; the power of the court being limited, as we have already said, to the disposition of the property, which is alone within its jurisdiction.

The pleadings in the case in which judgment was rendered for costs against *Alderson* are not before us. We have only the formal judgment, from which it should seem that the action was to recover an undivided interest in the property, and then to obtain a partition of it, and have that interest set apart in severalty to the plaintiffs,—a sort of mixed action to try the title of the plaintiffs to the undivided half of the property, and to obtain a partition of that half. Such action, though dealing entirely with the realty, is not an action in rem in the strict sense of the term. It is an action against the parties named, and though the recovery and partition of real estate are sought, that does not change its character as a personal action. The judgment therein binds only the parties in their relation to the property. The service of citation by publication may suffice for the exercise of the jurisdiction of the court over the property so far as to try the right to its possession, and to decree its partition; but it could not authorize the creation of any personal demand against de-

fendant, even for costs, which could be satisfied out of his other property.

The judgment is for all the costs in the case, and no order is made that they be satisfied out of the property partitioned. Had satisfaction been thus ordered, no execution would have been necessary. The execution, also, is general in its direction, commanding the sheriff to make the costs out of any property of the defendant.

The judgment, as far as the costs are concerned, must therefore be treated as a judgment in personam, and, for the reason stat-

ed, it was without any binding obligation upon the defendant; and the execution issued upon it did not authorize the sale made, and, of course, not the deed of the sheriff. Were the conclusion otherwise, it would follow, as indeed it is claimed here, that a joint owner of real property might sue a non-resident co-tenant for partition, and, having had his own interest set apart to himself, proceed to sell out on execution the interest of his co-tenant for all the costs.

The judgment of the court below must be affirmed; and it is so ordered.

CROSS v. ARMSTRONG.

(10 N. E. 160, 44 Ohio St. 613.)

Supreme Court of Ohio. Jan. 18, 1887.

Error to district court, Tuscarawas county.

The action below was commenced by the filing in the court of common pleas of a petition which, in substance, alleges that the plaintiff is the administrator of William Armstrong; that the assets are insufficient to pay the debts; and that the defendant is the widow of the deceased. The intestate, April 26, 1870, effected an insurance upon his life, for the sum of \$10,000, in the Provident Life & Trust Company of Philadelphia, Pennsylvania, then doing business in Ohio as an insurance company, and caused the policy to be made payable on its face to his wife, Polly Armstrong, the defendant. By the terms of the policy, the assured, William Armstrong, agreed to pay, and did annually pay, the sum of \$594, yearly premium for such insurance, from the date of the policy until the time of his death, which occurred March, 1879. The intestate, at the time of his death, held the policy in his possession, at his domicile in Ohio. The deceased, the plaintiff, and the defendant were always citizens of, and domiciled in, this state. After the death of the assured, the defendant obtained possession of the policy, collected of the company the entire amount secured thereby, and surrendered it to the company; and she now holds the sum of \$7,475.75 of the \$10,000 received by her, for the use of the plaintiff, as the representative of the deceased. To this an answer was filed, which alleges in substance—First. That the Provident Life & Trust Company is a corporation organized under the laws of Pennsylvania; that the insurance contract mentioned in the petition was effected in that state, to be performed, and was performed, in that state; and that, by the laws of Pennsylvania, and by virtue of the contract, the right vested in the defendant to receive the whole of the insurance money secured by the policy for her sole use and benefit. Second. That July 25, 1879, the defendant instituted a suit in a common pleas court, of the city of Philadelphia, upon that policy, against the insurance company, to recover the \$10,000 named therein; that before plea pleaded the company came into court, and suggested that the administrator of William Armstrong claimed to have some interest in the insurance fund, and prayed for leave to bring the money into court, and for an interpleader between the said Polly Armstrong and the administrator of her husband, touching their rights, respectively, to the proceeds of such insurance; that such leave was granted, and a rule entered requiring the administrator to show cause why an interpleader should not be awarded between him and Polly Armstrong to determine their respective rights

and ownership in the fund agreeably to the laws of Pennsylvania, a copy of which rule, under the seal of the court, was, pursuant to the laws of Pennsylvania and the practice in said court, delivered to said administrator, at the county of Tuscarawas and state of Ohio, together with a letter from the attorney of the company, notifying him that, under the laws of that state, it was necessary for him to appear. Afterwards, the rule being made absolute, and the money having been paid into court, a citation was duly issued under seal, requiring and summoning the administrator to appear in court and interplead, and notifying him that, in case of default, the moneys would be awarded to said Polly, and he declared estopped and debarred from any further right or claim therein; which citation, pursuant to the laws of Pennsylvania, was duly served on the administrator, by delivering the same to him at said county of Tuscarawas. The administrator not appearing, the court adjudged and decreed that the entire fund be paid to Polly, and that the administrator be estopped and debarred from all claims to any part of said fund or in the policy of insurance. To this answer the plaintiff interposed a general demurrer. The court of common pleas overruled the demurrer, and rendered judgment for defendant; which judgment was affirmed by the district court. To obtain a reversal of these judgments the petition in error is filed in this court.

H. T. Stockwell, for plaintiff in error. J. T. O'Donnell and Alexis Cope, for defendant in error.

SPEAR, J. The questions arising in the case are presented by the demurrer to the answer. It will be observed that there is no denial of the allegations that, at the time of the effecting of the insurance upon the life of William Armstrong, he and the defendant were residents of and domiciled in Ohio, and that they continued to so reside until his death, and she has ever since resided within the state; that the premiums, \$594 each year, were wholly paid by the husband; that the debts of the estate are over \$3,000, while the assets are not more than \$700; and that the defendant has received from the insurance company the entire amount of the insurance money covered by the policy, \$10,000. The claim of the plaintiff is based upon the statute of Ohio, section 3268, while the defendant's claim is that the rights of the parties are measured by the laws of Pennsylvania, the place where the contract was made, and was to be enforced, and that those rights have been adjudicated upon and determined by the decree and judgment of the court of common pleas of Philadelphia, set up in the second defense of the answer. It is urged that, by the common law, the contract of insurance is to be construed by the law of the place where

made; that the law of that place governs as to the nature, obligation, and interpretation of the contract; that, where the plaintiff would have no right of action by the law of the state where the contract was made and to be performed, he can have none here; and that, by the laws of Pennsylvania and by virtue of the contract, the right rested in the defendant to receive for her own exclusive use the whole of the money secured by the policy.

Assuming, without holding, that the law of Pennsylvania is sufficiently pleaded in the answer, and that, unless the question is determined by the statute referred to, the claim made by the defendant as to the effect of the law of Pennsylvania upon the rights of the parties here is conclusive, how, if at all, are those rights affected by section 3628 of the Revised Statutes? That section reads as follows: "Any person may effect an insurance on his life, for any definite period of time, or for the term of his natural life, to inure to the sole benefit of his widow and children, or of either, as he may cause to be appointed and provided in the policy; and the sum or net amount of insurance becoming due and payable by the terms of insurance shall be payable to his widow or to his children, for their own use, as provided in the policy, exempt from all claims by the representatives and creditors of such person; but the amount of premium annually paid on such policy shall not exceed the sum of one hundred and fifty dollars, and, in case of such excess, there shall be paid to the beneficiaries named in the policy such portion of the insurance as the sum of one hundred and fifty dollars will bear to the whole annual premium, and the residue to the representatives of the deceased."

In obtaining an insurance of this kind, the manifest intent of the husband is to make provision for those dependent upon him, a purpose every way rightful and laudable. It is to be done by applying, from year to year, the money of the husband, obtained from proceeds of his own labor or otherwise, to the future use and benefit of those who stand in such relation to him as to give them a natural claim to his effects, forethought, and bounty. And, up to a certain point as to expenditure, such provision may legally be made. In the same spirit our laws allow to the widow and her lands, use of the mansion house one year, a homestead right, a year's support out of the personalty, a given proportion of the residuum after debts are paid, and certain specific articles of personal property, if such the deceased possessed. But the same laws recognize others as having rights as regards the property of the deceased. The creditors are not to be wholly ignored, even though there be a needy widow and needy children. As to the section referred to, while it recognizes the right of the husband to make provision for those of the family who may survive, to the extent of \$150

yearly thus invested, it also provides that, as to insurance effected by payments over that sum, it shall inure to the legal representative. No question is made that, as to contracts with Ohio companies, the statute would apply. Should it receive such construction as to confine its operation to that class of contracts? It is not doubted that it is competent for the general assembly to enact laws which in effect forbid citizens of the state from resorting to the courts of sister states for the purpose of defeating the operation of laws of Ohio as to questions which affect the rights of other citizens of Ohio. The law which gives to a debtor, the head of a family, and not the owner of a homestead, an exemption as against a claim of a creditor in attachment, where the sum due the debtor is shown to be necessary for the support of the family, is a law of that kind, inasmuch as it is held that such creditor may be enjoined from bringing action in courts out of Ohio where such exemption could be permitted. And the law in question, if it applies to policies issued by companies other than those organized in Ohio, is an inhibition against citizens of Ohio placing moneys beyond the reach of creditors, by entering into contracts with insurance companies organized out of this state. It will be noticed that the words of the statute do not limit its application. The language is comprehensive, and in terms it applies to all contracts of insurance obtained by citizens of the state. Why should we assume that the legislature intended that, if the company happens to be a home company, the statute applies, while, if one located in another state, it does not apply? Why not assume, rather, that that body intended to correct the mischief which the very enactment of the statute raises the implication then existed? It is but the ordinary rule to give such construction to statutes as will advance the remedy and correct the mischief. Applying the law only to home companies would, in great measure, defeat the very purpose apparent in this legislation. The general assembly must be assumed to have at least such general and common knowledge upon subjects of legislation as is possessed by citizens at large; and it is matter of common information that the great proportion of policies written upon the lives of citizens of Ohio are issued by companies organized outside the state, and there is little doubt that this was true in a larger sense even at the time this statute was enacted (1847) than it is now. Statistics, believed to be reliable, show that, in the year 1884, out of about 15,000 policies and certificates written upon the lives of citizens of this state, more than 10,000 were written by foreign companies, and out of \$33,000,000 gross amount covered by those policies and certificates nearly \$25,000,000 were in policies issued by foreign companies. It is probable that, prior to the organization of the various relief and aid associations now so common, the disproportion

was greater than the above figures show. The parties to this litigation are citizens of the state of Ohio, and were when rights under this policy accrued. Those rights are being adjudicated in the courts of Ohio. Why should those courts ignore our own law, or make it subordinate to the law of another state? We think they should not. To do so would permit a citizen, largely indebted, to invest his capital and earnings to an unlimited amount for the benefit of members of his family in insurance contracts in distant states, thus making a fraud upon deserving creditors, by placing such sums beyond their reach, notwithstanding such investments would be in spirit a plain violation of the whole policy of our laws regulating the respective rights of debtor and creditor. Very much more might be said in elaboration of this view, but we deem it unnecessary to take further space, as we feel confident that enough has been indicated to make it clear that the demurrer as to the first defense of the answer was well taken, and should have been sustained.

Does the second defense set up in the answer stand in the way of a recovery? The contention on part of defendant is that, by the judgment of the Philadelphia court, the matter in issue here is *res adjudicata*, and this is so, if that court had jurisdiction of the subject-matter and of the person of the plaintiff. The record shows that the service on the plaintiff was by delivering to him in Ohio a copy of the rule of court requiring him to show cause why the court should not give direction to the company to bring the \$10,000, owing by it on the policy, into court, and why he should not interplead with Mr. Armstrong as to conflicting rights to such money, together with a letter from the company's attorney, advising him to appear, and by like service afterwards of a copy of a rule absolute, and of citation to appear and interplead. Is such notice sufficient to require an Ohio administrator to go to another state to litigate, in the courts of that state, with a citizen of Ohio, questions arising under the laws of Ohio affecting the estate which he represents, or refuse at his peril? It is probable that no injustice would in this case be done if the question were put in this way: Can a resident of Ohio resort to the courts of another state, and there compel an administrator, resident of Ohio, and deriving his authority from the courts of this state, to litigate a dispute existing between them, wherein the rights of the administrator depends upon the law of Ohio, for the express purpose of evading the effect of our statute, and of obtaining a judgment which would be contrary to the law of the domicile of both?

It is urged that when the company asked that an interpleader be awarded, and brought the money owing by it into court, the court then obtained jurisdiction of the fund, and, from that time forward, the proceeding was

one essentially in *rem*, and the court, having then obtained jurisdiction of the *res*, and having given notice according to the laws of Pennsylvania, had ample power to hear and determine, and having so heard and determined, the parties are bound by the judgment. That such proceeding could be in *rem* seems a novel doctrine. "In *rem*" is understood to be a technical term, taken from the Roman law, and there used to distinguish an action against the thing from one against the person, the terms in *rem* and in *personam* always being the opposite one of the other; an act in *personam* being one done or directed against a specific person, while an act in *rem* was one done with reference to no specific person, but against, or with reference to, a specific thing, and so against whom it might concern, or "all the world." A proceeding brought to determine the status of the thing itself,—the particular thing,—and which is confined to the subject-matter in specie, is in *rem*, the judgment being intended to determine the state or condition, and, *pro facto*, to render the thing what the judgment declares it to be, while a proceeding which seeks the recovery of a personal judgment, is in *personam*. In the former, process may be served on the thing itself, and by such service, and making proclamation, the court is authorized to decide upon it without other notice to persons, all the world being parties, while, in the latter, in order to give the court power to adjudge, there must be service upon those whose rights are sought to be affected. As regards rights, the terms signify the antithesis of "available against a particular person," and "available against the world at large." Thus, "*jura in personam*" are rights primarily available "against specific persons; *jura in rem*, rights only available against the world at large." Beyond this, a judgment or decree is in *rem*, or in the nature of a judgment in *rem*, while it binds third persons, such as the sentence of a court of admiralty on a question of prize; or a decree of other courts upon the personal status or relation of the party, such as dissolution of marriage contract, bastardy, etc.; a decree in probate court admitting a will to probate and record, granting administrators, etc.; or a decree of a court of a foreign country as to the status of a person domiciled there. We quote from *Freem. Judgm.* the definition of "judgment in *rem*" given by that author: "An adjudication against some person or thing, or upon the status of some subject-matter, which, whenever and wherever binding upon any person, is equally binding upon all persons." In contract, a judgment in *personam* is, "in form, as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the record itself." *Woodruff v. Taylor*, 20 Vt. 65. From all which it appears that a judgment in *rem*, at least when against anything, may bind the *res* in the absence of

any personal notice to the parties interested; but a judgment in personam, as we have seen, can have no validity except upon service on the interested parties, or what is equivalent to it. Why was the Philadelphia action, in its nature, not a proceeding between parties claiming right to money due under the policy, rather than a proceeding to determine the status of such money? If it was the former, then the efficacy of the judgment depended upon having the parties before the court so that these conflicting claims could be adjudicated; if the latter, then it would appear to be one wherein the court's judgment would have been effectual and conclusive without reference to whether the parties were before the court or not; and the rights of both of them could have been as well settled by the filing of a bill by the insurance company, and the bringing of the money into court, and without the presence, by service or appearance, of either of the parties claiming to be interested in the fund. It was not the status of any particular money that was to be determined; for any money which was a legal tender would have effectually satisfied the claim of the party receiving it; nor was there any claim primarily, by even the widow, much less the administrator, to any money in specie; nor did either the company or the widow, at any time, claim or admit that the administrator had any money or property within the jurisdiction of the court, or valid claim to any subject-matter sought to be affected by the decree to be rendered. The proceeding was clearly one of interpleader, and that only. We do not understand that an action in personam, simply because a debtor brings money, the right to recover which is in contention, and gives to the custody of the court a sum sufficient to discharge his debt, changes into an action in rem, or that an interpleader suit is, in its nature, a proceeding in rem. In the Philadelphia case the company could have begun the action by original bill, and obtained a complete standing in court, if, with other proper averments, the pleader had alleged a willingness to bring the money into court. Manifestly, the action thus begun would not have been in rem. Then, does the mere fact that the company, (the debtor,) being sued, voluntarily delivers money to the clerk of the court, rather than keep it in its own safe, or to its credit in bank, or loaned upon call, change the action from one in personam to one in rem? We think not.

It will be borne in mind that the Philadelphia suit was essentially unlike an attempt to reach, by process of attachment, the property of an absent party. It was rather an attempt to estop the administrator from claiming any recovery against the company, to draw the estate of William Armstrong to a distant state for settlement, and an attempt to compel the administrator to litigate, against his will, in a Pennsylvania

court, a controversy affecting the estate, and with another resident of Ohio; hence the class of cases which treat proceedings in attachment as substantially proceedings in rem have no application to the case at bar. If the case made in the answer cannot be treated as a suit in rem, it appears clear that the judgment rendered is void, as against the administrator, for want of jurisdiction, at least, of his person. No support is given that judgment by the constitutional provision, and the act of congress of 1790 passed pursuant to it, which gives in all states the same faith and credit to a judgment of a state as it has by law or usage in the courts of the state where rendered; for, whatsoever strict construction was given that provision by the earlier decisions, it is now well settled that parties sought to be affected by a judgment rendered in another state are not precluded from showing that the court wherein the action was pending had no jurisdiction, either of subject-matter or of the person; for, in order to entitle a judgment rendered to such full faith and credit, the court must have had jurisdiction as well of parties as of subject-matter. The law on this point is well stated by Johnson, J., in *Pennywit v. Foote*, 27 Ohio St. 618, as follows: "From a careful review of numerous cases, we find the rule now well settled that neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court in which the judgment offered in evidence was rendered, and such a judgment may be contradicted as to the facts necessary to give the court jurisdiction; and, if it be shown that such facts did not exist, record will be a nullity, notwithstanding it may recite that they did exist, and this is true either as to the subject-matter or the person, or in proceedings in rem as to the thing." The state of Pennsylvania could not extend its sovereignty into the state of Ohio. It could not, in an action in personam, compel a citizen of this state to respond to the process of its courts served in this state. "No sovereignty can extend its process beyond its own territorial limits, to subject either person or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of hindering such person or property in any other tribunals." Story, *Conf. Laws*, § 539. "The jurisdiction of state courts is limited by state lines, and upon principle it is difficult to see how an order of court, served upon a party out of the state in which it is issued, can have any greater effect than knowledge brought home to the party in any other way. Mere knowledge of the pendency of a suit in the courts of another state, without service of the process, or an appearance, is not sufficient, of

itself, to compromise the rights of the party in this state." *Ewer v. Coffin*, 1 Cush. 23.

The conclusion we have reached is strengthened by a consideration of the policy and provisions of our statute, which directs in what county an administrator may be sued. Section 5031 of the Revised Statutes provides that actions against an executor, administrator, guardian, or trustee may be brought in the county wherein he was appointed or resides, in which case summons may issue to any county. When so careful a provision is made as to the situs of suits

against administrators in this state, and while, under the section referred to, this widow would have been confined to the limit above indicated in the bringing of an action in Ohio, to settle the rights of the parties to the amount due on the policy, it would seem strange, indeed, if she could, by choosing a court in another state, compel the administrator to follow her there to defend the claims of the estate he represented.

We are of opinion that the demurrer to the answer should have been sustained. Judgments reversed.

CARLISLE v. KILLEBREW.

(6 South. 756, 89 Ala. 329.)

Supreme Court of Alabama. Nov. 26, 1889.

Appeal from circuit court, Dale county; J. M. Carmichael, Judge.

This was an action of detinue, and was brought by the appellant, R. K. Carlisle, against the appellee, John C. Killebrew, and sought to recover certain crops taken from the premises by defendant. On the defendant being examined as a witness in his own behalf, he was asked by his counsel to "state whether he was put in possession by the sheriff of the lands upon which the crops were raised." The plaintiff objected to this question, the court overruled his objection, allowed the defendant to answer that he was so put in possession, and the plaintiff excepted. The bill of exceptions recites: "The defendant then offered in evidence, for the purpose of identifying fraction 12, [the tract of land on which the crops were alleged to have been raised, and which are in controversy in this suit,] a patent, regular on its face, from the governor of Alabama to Thomas L. Smith, conveying said fraction 12. * * * Defendant then introduced the deed from T. L. Smith to M. N. Killebrew, conveying fraction 12 as aforesaid. Said deed was acknowledged and recorded as required by law." The plaintiff objected to the introduction of both the patent and the deed, and reserved an exception to each of the court's rulings in admitting them. "The defendant then introduced a certified plat of said section 16 [in which said fraction 12 is situated] from the office of the secretary of state, to locate said fraction 12 as aforesaid." The plaintiff objected to the introduction of this certified plat, the court overruled his objection, and the plaintiff duly excepted. "Defendant then introduced Prof. McCartha, who swore he was a practical surveyor, and that he had in his hands an enlarged plat, and which was an exact copy of plat from secretary of state, and witness proposed to use said enlarged plat in locating fraction 12 for the jury." Whereupon the plaintiff objected to the said witness using the said enlarged plat, which objection the court overruled, and the plaintiff excepted.

After the general charge by the court, the plaintiff requested the court to give the following charge, which was in writing: "If plaintiff was in the actual and peaceable possession, at the time the plaintiff brought this suit, of the lands upon which the crops were raised, and that defendant had entered on said land and removed said crops without permission of plaintiff, then the plaintiff must recover in this action." The court refused to give this charge, and the plaintiff duly excepted. The defendant then requested the court to give the following charge, in writing, to the jury: "When Carlisle, in the defense of the suit brought by Killebrew for fraction 12, disclaimed being in possession of fraction 12, this disclaimer devolved upon the jury the duty of ascertaining whether or not he was in possession of fraction 12, and if the judgment rendered was against Carlisle on the disclaimer, and in favor of Killebrew for rent, Carlisle is estopped by the judgment from saying that he was not in possession of fraction 12, or that he was not in possession of the particular piece of land sued for as fraction 12, if it was embraced in his disclaimer." The court gave this charge, and the plaintiff reserved an exception to such giving by the court. There was judgment for the defendant. The plaintiff now prosecutes this appeal, and as signs the various rulings of the court below as error.

A. L. Millegan, M. E. Millegan, and H. L. Martin, for appellant. *H. H. Blackman*, for appellee.

SOMERVILLE, J. The defendant, Killebrew, the appellee in this case, had, prior to the present suit, recovered certain premises

from the plaintiff, Carlisle, in a real action in the nature of ejectment. He was formally put in possession by the sheriff under a writ of possession, and under such claim of right gathered and appropriated the crops of cotton, corn, and fodder growing on the land. Carlisle afterwards took possession of the land without resort to the courts, and brought the present action in detinue to recover the crops taken away by Killebrew.

1. The general rule of the common law is that one who recovers land in ejectment is entitled to the crops then growing on the premises, they being regarded as part and parcel of the realty. *McLean v. Bovee*, 24 Wis. 295; *Page v. Fowler*, 39 Cal. 412; *Thweat v. Stamps*, 67 Ala. 96. In other words, "as between the successful plaintiff in an action of ejectment and the evicted defendant, growing crops are a part of the realty." *Van Alen v. Rogers*, 1 Amer. Dec. 113, note, 116.

The statutes of Alabama modify this principle only by providing that, if the defendant in ejectment has a crop planted or growing on the premises recovered from him by the plaintiff, he may stay the writ of possession until the expiration of the year, by giving bond and sureties to the plaintiff to secure the rent to him, which is declared to have the force and effect of a judgment upon the defendant's failure to pay the rent at the expiration of the year. Code 1886, §§ 2712, 2713. No such bond having been given in this case, this statute can have no bearing on the rights of the parties litigant.

2. The main question in the present suit is whether the defendant, Killebrew, can be permitted to introduce in evidence, in this action for the crops severed from the freehold, the judgment of recovery in ejectment, and, if so, what force as evidence this judgment will exert. It is insisted by the appellant that the court below erred in admitting this judgment, and the writ of possession issued on it, because the question of title to the land cannot be litigated in a personal action, and for the further reason that, at common law, a prior judgment in ejectment was not admissible in a subsequent suit between the same parties. The former principle, applied to this case, operates to preclude the plaintiff, Carlisle, from challenging the defendant's right of possession and title acquired under his judgment in ejectment. *Beatty v. Brown*, 76 Ala. 267; *Stringfellow v. Curry*, Id. 394. The latter rule is so stated by some of the old writers, and is based upon the use of fictitious names in the action of ejectment proper, which is still tolerated in our form of practice. But this is not a second action of ejectment in which it is sought to use as evidence a judgment recovered in a former action. The present is a personal action, and the rule applies, as against the plaintiff himself, that he cannot collaterally raise the question of title to the land by way of showing incidentally his right to the crops severed from the freehold. *Martin v. Thompson*, 120 U. S. 376, 7 Sup. Ct. Rep. 586.

In our practice, under the statute, it requires two verdicts and judgments for the defendant to bar further suit by the plaintiff in ejectment, or the real action in the nature of ejectment. Code 1886, § 2714. But where the question of title arises collaterally, as in an action for mesne profits, or otherwise, the record of a recovery in ejectment is not only admissible in evidence in favor of the party put in possession under it, but is conclusive between the same parties, and their privies, on the same title, as to the question of possession and title. *Shumake v. Nelms*, 25 Ala. 126; *Howard v. Kennedy*, 4 Ala. 592; *Van Alen v. Rogers*, 1 Amer. Dec. 113, note, 116; 2 Greenl. Ev. § 333; *Camp v. Forrest*, 13 Ala. 114; 6 Amer. & Eng. Cyclop. Law, 245g; *Chirac v. Reinecker*, 2 Pet. 613, 622; *Equator Co. v. Hall*, 106 U. S. 86, 1 Sup. Ct. Rep. 128; *Caperton v. Schmidt*, 85 Amer. Dec. 187, note, 208. The judgment recovered in the ejectment suit involved the title and right of possession of the parties to the present suit to the same lands, upon which the crops in dispute were at the time growing, and was conclusive on collateral attack as to the title of the lands, and therefore of the growing crops which were a part of the freehold at the time of recovery.

3. The plat of fraction 12 in dispute, proposed to be introduced by the plaintiff, was ruled out by the court as inadmissible. This was alleged to be the "original plat" of this land given to the plaintiff as such by the secretary of state. No legal proof was made on this point, however, and the paper is not before us for inspection. We cannot say that the trial court erred in excluding it from the jury.

4. We do not judicially know that the judgment of ejectment for the recovery of "fraction 12, a part of the S. E. $\frac{1}{4}$ and [of] N. E.

$\frac{1}{4}$ sec. 16, T. 4, R. 4, containing 34 75-100 acres," was void for uncertainty, on the ground that no such land exists. The record shows that it was surveyed by the county surveyor, and was found *prima facie* correct. Moreover, the objection taken to the admission of this judgment, and other parts of the record accompanying it, was so general and undefined in its character that it was competent for the court to ignore it; no ground of objection whatever being particularized. *Dryer v. Lewis*, 57 Ala. 551; *March v. England*, 65 Ala. 275; *Steele v. Tutwiler*, 57 Ala. 113.

5. The other evidence to which objection was taken by appellant was admissible to explain the extent of defendant's possession, and to identify the lands on which the crops in dispute were grown.

6. The court did not err in refusing to admit in evidence the verdict and judgment in the criminal prosecution instituted by Killebrew against the plaintiff, Carlisle, for removing the crops, in which the latter was acquitted by the presiding magistrate. A verdict and judgment in a criminal case is not generally evidence of the fact upon which the judgment was founded in a civil proceeding. 1 Starkie, Ev. (Sharswood) *363-365.

7. So the judgment of the magistrate showing a recovery of damages by Carlisle against Killebrew in the action of malicious prosecution, based on the prosecution last referred to, is not shown to involve the determination of any fact relevant to the present issues. The judgment of acquittal, moreover, in the criminal case, upon which the case of malicious prosecution was based, being inadmissible as above stated, the latter proceeding must also be excluded. We find no error in the record, and the judgment is affirmed.

NEEDHAM v. THAYER.

(18 N. E. 429, 147 Mass. 536.)

Supreme Judicial Court of Massachusetts.
Hampshire. Oct. 22, 1888.

Exceptions from superior court, Hampshire county; Dunbar, Judge.

Action upon a judgment obtained by plaintiff in the superior court in 1874. The answer alleged, that at the time of the service of the writ in the suit in which the judgment was recovered defendant was an inhabitant of the state of Connecticut, and had no notice of the commencement of the action, or its pendency; and that he was not indebted to plaintiff in the amount for which judgment was rendered. The court admitted, against defendant's objection, the record of the former suit, and excluded evidence in support of the allegations of the answer. The court found for plaintiff, and defendant excepted.

D. W. Bond, for defendant. Maynard & Spellman, for plaintiff.

MORTON, C. J. The question of the validity of a judgment rendered by a court of this state against a defendant, who was not a resident of the state, and who was not served personally with process within the state, was considered in *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705. In that case this court, following the decisions in the supreme court of the United States, held that such judgment contravened the fourteenth article of the amendments of the constitution of the United States, and was invalid, and would be reversed upon a writ of error. The case at bar presents the question whether, in a suit in this state upon such a judgment, the defendant may show, by plea and proof, that it is invalid. The recent cases in the supreme court of the United States go upon the ground that a judgment in personam against a person who is not a resident of the state, who

has not been personally served with process, and who has not appeared, is wholly void, and that no suit can be maintained on it, either in the same or in any other court. *Pennoyer v. Neff*, 95 U. S. 714, 732; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165. The court has no jurisdiction, and its judgment has no force, either in the state in which it was rendered, or in any other state. This being so, the judgment cannot be enforced by a suit upon it; and the non-resident defendant cannot be deprived of his right to show by plea and proof, if such suit is brought, that the judgment is void, without an abridgement of his privileges and immunities, to protect which was the object of the fourteenth article of amendment. To compel him to resort to our courts by a writ of error, in which he must file a bond if he would obtain a stay of the execution, is to impose a burden upon him, and thus to abridge his privileges and immunities. It has been held in many cases that a domestic judgment cannot be impeached by plea and proof in a suit brought upon it, because the proper remedy is a writ of error. *Hendrick v. Whittemore*, 105 Mass. 26, and cases cited. But while a state may make laws binding its own citizens, requiring them to resort to a writ of error, it cannot so bind citizens of other states. The case of *McCormick v. Fiske*, 138 Mass. 379, seems opposed to our views. But in that case the question of the effect of the fourteenth article of amendment was not raised or suggested to the court, and therefore is not considered. In the case at bar the effect of that amendment is involved. The defendant's answer sets up that, at the time when the original suit was brought against him, he was a non-resident, and that no service was made upon him. We are of the opinion that he had the right to impeach the judgment by proof of these facts, and that the ruling rejecting such evidence was erroneous. Exceptions sustained.

O'BRIEN v. FRASIER.

(1 Atl. 465, 47 N. J. Law, 349.)

Supreme Court of New Jersey. Nov. 3, 1885.

Writ of error.

The suit was for a malicious prosecution. The declaration set forth, in the usual form, the good character of the plaintiff, and that the defendant, intending to injure her in her fame and credit without any reasonable cause, made a charge of perjury against her, and so caused her arrest and imprisonment in the county jail until she was discharged on account of no indictment having been found against her by the grand jury; that by means of these facts she was greatly injured in her said credit and reputation, and brought into public scandal, infamy, and disgrace, etc. The plea was the general issue.

Stevenson & Ryle, for plaintiff in error.
A. M. Ward, for defendant in error.

BEASLEY, C. J. The bills of exceptions sent up with the writ in this case present three points for adjudication. These several propositions will be considered in the order in which they stand in the brief of the counsel of this plaintiff in error. The basis of the suit was the arrest and imprisonment of the plaintiff on an affidavit made by the defendant containing a charge of perjury, and which charge, it was asserted, had been made falsely, maliciously, and without probable cause. The false swearing thus imputed to the plaintiff consisted in a statement made by her under oath, in a suit between herself and the defendant, that a certain bank-book which she had turned over to the defendant contained a credit of a certain sum due from the bank to her. Upon the strength of this affidavit a justice issued a warrant, and the plaintiff had been arrested and imprisoned until she was discharged in consequence of the grand jury failing to find an indictment against her. At the trial of the cause it was admitted by the counsel of the defendant that the statements of this affidavit were altogether untrue, and that there had been no probable cause for the arrest and imprisonment of the plaintiff on that particular charge; and the defense was that, although he signed the affidavit upon which the warrant issued, he did such act by mistake; that the charge which he intended to make was of a different character; that what he meant to depose was that the plaintiff, on the trial referred to, had sworn falsely with respect to a certain amount of cash she had given him, and not, as it stood in his affidavit, that she had falsified touching the contents of the bank-book which she had transferred to him. In this aspect the defendant was permitted at the trial, when he was on the witness stand, to testify that he did not intend to charge in his affidavit that the plaintiff swore falsely as to the amount

of money placed to her credit in her bank-book, but that she swore falsely with respect to the amount of cash she had paid to him, and that the magistrate before whom he had laid his complaint, from a misconception of his statement, inserted the former instead of the latter accusation, and that he had ignorantly taken the oath in that form. This offer of proof was rejected by the court, and, in effect, the defendant was not allowed to prove that he believed that the plaintiff had perjured herself in her allegation of the amount of cash she had paid to him, and that his purpose had been to charge her with that offense.

The circumstances of the case are peculiar; but, upon reflection, I am satisfied that the testimony thus shut out was admissible. It is not regarded as legal, on the ground stated in the brief of counsel, which was that it helped to support the defendant's statement that he had not meant to make the particular accusations contained in his affidavit; for such a collateral issue could not be interpolated merely by way of confirmation. But it is conceived that it was legitimate evidence, as it was an essential part of the defense interposed. The case was in this situation: The defendant's affidavit had been produced, and it had been proved that its crimination was without foundation, and without color of foundation. This the defendant admitted, and he thereby confessed that he had made a false charge of crime against the plaintiff, resting on no probable cause, and that by reason of such improper action on his part she had been arrested and imprisoned. If the case had been closed at this point, the jury would have been constrained in right reason to find, not only that the prosecution had been founded in falsehood to the knowledge of the defendant, but that it was consequently malicious, and thus his liability would have ensued. In this posture of affairs the defendant could not controvert the fact that the charge that he had in point of fact sworn to was false and without foundation, but it was still open for him to disprove the inference that would have necessarily resulted from the admitted facts that he had put the law in motion against the plaintiff from a malicious motive.

The existence of an illegal intention in this action was as essential to its support as were the falsity of the crimination and the absence of reasonable ground for a belief in its truth. In order to manifest a legal motive for his conduct, the offer was made to the effect that the charge that he had meant to make was one touching a different matter, and that such latter inculpation was true according to his belief. It will be observed that if this had been the true attitude of the defendant, that is, reasonably believing that the plaintiff had committed the crime of perjury in the particular sought to be shown, and he had taken steps in behalf of public justice to call her to

account, and in that course of law a mistake in the affidavit had supervened, it is clear that, no matter how negligent he had been, his motive had not been illegal. Proof of the naked fact that one charge had been substituted for another would not of itself have been a defense to the action, because it would not have exhibited a legal motive for the defendant's conduct. It would have been consistent with such a state of proof that he had been actuated in the affair either by a legal or illegal inducement to the course taken. In order to test the principle, suppose the defendant had proved that he had intended to charge a crime upon the plaintiff which he knew she had not committed, but that by mistake he had charged a different offense, and had caused her imprisonment for it, would such proof have been a defense to this action? Such a contention very plainly would not have availed. The defendant could not escape responsibility by the subterfuge that the unintended and not the intended falsehood had worked the plaintiff injury. On this side of the case the question is whether the defendant's motive was illegal with respect to the course of law leading to the arrest of the plaintiff, rather than to the particular mode of procedure that was adopted. No reason suggests itself why the doctrine should be made a part of the legal system that when a person has been subjected to the suffering and ignominy to which the plaintiff was subjected, such person is to be without redress if, through the inadvertence or negligence of the prosecutor, a mistake has been fallen into with respect to the particular charge which it was intended to make, no matter how improper or vicious the purpose of such prosecutor may have been. As the case stood before the court below, it had appeared that the charge made was false; that there had been no reasonable cause for believing it to be true; and the conclusion is that unless the defendant could show that his motive for putting the prosecution on foot was not malicious, that is, was not such a motive as the law prohibited, the action was sustained. There was error, therefore, in rejecting the testimony in question.

The second objection urged against the proceedings at the trial also arises from the exclusion of proofs offered by the defendant. The defendant, desirous, apparently, to disparage the general reputation of the plaintiff in point of morals, asked of a witness the following question: "Do you know the reputation of Mrs. Frasier in the city of Paterson?" This interrogatory, in the form stated, was overruled; the court directing the counsel to make the inquiry more specific. The following interrogatories were then propounded, and were successively overruled, to-wit: "Are you acquainted with the general reputation, among her neighbors and acquaintances, of the plaintiff?

Do you know whether the plaintiff has been charged with crime prior to the complaint which Mr. O'Brien made against her? Are you acquainted with the general reputation which the plaintiff had among her friends and neighbors prior to the time that Mr. O'Brien made his charge against her? Do you know whether, prior to the charge that Mr. O'Brien made against her, the defendant had obtained and acquired the good opinion and credit of her neighbors? Are you acquainted with the reputation which Mrs. Frasier had, prior to Mr. O'Brien's charge against her, for virtue?"

With respect to these inquiries, two topics are discussed in the briefs of counsel: First, whether the general character of the plaintiff in that action was open to attack; and, second, this being answered in the affirmative, whether the interrogatories, or any of them, which were addressed to the witness were in due form.

Touching the first subject, it is conceived that when a plaintiff in a suit for malicious prosecution founds his action in part on an injury done to his character by such prosecution, that the legal rule is quite settled that he thereby puts his general character in issue. As long ago as the case of *Savile v. Roberts*, reported in 1 *Ld. Raym.* 374, Lord Holt, in defining the damages which will support a suit of this character, states, as his first class, those instances where the only injury consists in the "damage to a man's fame, as if the matter whereof he is accused be scandalous." It would seem to follow, therefore, that whenever the action is used as a means of reparation for an injury in whole or in part done to his character, the plaintiff in such procedure must stand in precisely the same attitude that the actor in an action for libel or slander assumes, and in the latter class of cases it has been adjudged in this court that the general bad character of the plaintiff at the time of the alleged grievance is admissible on the part of the defense in mitigation of damages. The case indicated is that of *Sayre v. Sayre*, 25 *N. J. Law*, 235, in which Chief Justice Green reviews the English and American decisions on this subject, and finally declares the class of evidence in question is admissible in mitigation of damages, on the broad ground "that it cannot be just that a man of infamous character should, for the same libelous matter, be entitled to equal damages with the man of unblemished reputation." It is also to be noted in this connection that in his discussion of this subject the accurate jurist just mentioned evidently considered the action for malicious prosecution based on an injury to character as *in pari materia* with the action for libel or slander, and refers to both procedures throughout his opinion as resting on the same general principle. And, indeed, it does not seem to be deniable that a malicious prosecution for an indictable and odious

offense is a libel, to which is, in some cases, superadded illegal imprisonment and the loss of property, so that it would be quite abnormal for the same court to declare that in the actions for libel the plaintiff's character is in issue, but in actions for malicious prosecutions it is not in issue. And the decision just referred to appears to accord with the great weight of authorities, as will plainly appear by reference to any of the leading text-books treating of the subject. 1 Whart. Ev. § 54; Bacon v. Towne, 4 Cush. 217; Fitzgibbon v. Brown, 43 Me. 169. Evidence as to the bad moral character of the plaintiff was, it is considered, plainly admissible in mitigation of damages. Whether such testimony would have been proper, if such issue had been presented on the facts, as a circumstance going to make up a reasonable cause for the conduct of the defendant is a question not now sub judice.

With regard to the other branch of this subject, it seems to me that the form of some of the questions put to the witness were unobjectionable. It was not merely the bad character of the plaintiff on the point in which it had been vilified that was subject to discussion, but her character generally with respect to morals. That the inquiry has this scope was fully considered and declared in the case just referred to of Sayre v. Sayre. Consequently the interrogatory thus phrased, "Are you acquainted with the general reputation which the plaintiff had among her friends and neighbors prior to the time that Mr. O'Brien made his charge against her?" would seem to have been all that the rules of practice require. According to common usage the phrase refers to the general moral character of the person referred to, and it seems to savor of hypercriticism to suggest that a question

thus framed embraces other than moral traits of character. It would not be easy to put the inquiry in a shape at once succinct and yet comprehensive, so as not to be open to such a subtle objection, for the line that separates what is immoral from what is indecorous is oftentimes exceedingly indefinite and indistinct. It will be found, by referring to the language of the judges as found in the reports, that the expressions "bad character" and "general reputation" are constantly used to signify character and reputation with regard to morals. And if this matter were in doubt, the other question which was propounded and overruled, in the words, "Are you acquainted with the reputation which Mrs. Frasier had, prior to Mr. O'Brien's charge against her, for virtue?" was sufficiently specific; for the inquiry necessarily tested the knowledge of the witness with reference to the general moral standing of the plaintiff in public estimation. The result is that these two questions were improperly overruled.

The third and last exception relates to the rejection at the trial of the following questions put by the counsel of the defendant to one of the witnesses, to-wit: "Do you know whether, prior to Mr. O'Brien's charge against this woman, [the plaintiff,] she was living in adultery with Mr. —?" It is plain that the judicial course on this subject was correct. Particular criminal acts, as a general rule, cannot be set up either against a party or a witness. If the rule were otherwise, innumerable issues, incapable of all reasonable trial, would be raised in the progress of the ordinary suits. It is not known that any case warrants the introduction of such a species of testimony.

Let the judgment be reversed on the grounds above defined.

BACKDAHL et al. v. GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN.

(48 N. W. 454, 46 Minn. 61.)

Supreme Court of Minnesota. April 8, 1891.

Appeal from district court, Hennepin county; REA, Judge.

Merrick & Merrick, for appellants. W. H. Adams and E. Southworth, (Joseph A. Eckstein, of counsel,) for respondent.

COLLINS, J. Plaintiffs, as the heirs of Alfred Backdahl, deceased, brought this action to recover the amount of \$2,000 upon a beneficiary certificate issued by defendant to him. The answer denied that plaintiffs were the heirs, and alleged two defenses,—the *first*, that Backdahl had been suspended for non-payment of an assessment; *second*, that he had been suspended for non-payment of dues. When the trial commenced, plaintiffs moved that defendant be required to elect between these two defenses relating to non-payment, on the ground that they were inconsistent. The test of consistency in two defenses is, can the facts pleaded in both be true? If so, then, although either being proved, proof of the other may be unnecessary, they are not inconsistent. As the two suspensions alleged in the answer were at different times, for different causes, effected in different ways, and having different consequences, the last in point of time being more comprehensive than the other, and as, notwithstanding the earlier, the defendant might have made the later suspension, they were not inconsistent. The verdict was for defendant. Each party claims, in effect, to have been entitled to a direction from the court for a verdict. As it is necessary to reverse the order denying a new trial, we will not consider in detail the 24 assignments of error, many of them unfounded, but will refer only to some general questions, which, in all probability, will arise on a second trial.

1. To prove that plaintiffs were sole heirs of Backdahl, they offered in evidence the decree of the probate court distributing his estate. This was properly excluded, for while binding, as to the matters adjudicated, upon the parties to the administration proceedings, it was no evidence of the facts on which it was based against a stranger to such proceedings, as was this defendant. To prove they were such heirs, plaintiffs further offered, and the court admitted, the testimony of a witness whose only knowledge in reference to the subject had been derived from his acquaintance with the family and with Backdahl, the witness and the latter residing in this country, the plaintiffs in Sweden. Although that sort of evidence is in the nature of hearsay, is based on hearsay, it is admissible from necessity, because many times in no other way could relationship be shown but by proof that relationship in and to a particular family was recognized by the members of the family. 1 Greenl. Ev. §106. When such testimony is introduced, it is for the jury to determine, from the extent of the witness' acquaintanceship with the family

and his opportunities for knowing that its members recognized the particular person as a member, what weight to give it. In this instance, at least, the testimony of the witness made a *prima facie* case for the plaintiffs on the question of kinship.

2. There was a contest on the evidence as to the making and notice to Backdahl of the assessment for non-payment of which the suspension set out as a first defense was alleged. It appears from the constitution of defendant that, when a member entitled to participate in the beneficiary fund dies, the subordinate lodge to which he belonged is to notify, by a prescribed form of death notice, the grand recorder of defendant lodge, who, on the first day of the following month, is to notify each subordinate lodge. It is then the duty of the latter to forward to the grand recorder the beneficiary fund on hand in such lodge, (the sum being one dollar for each certificate, and such sums as may have been received for certificates renewed,) and then to make an assessment of one dollar upon each member holding a certificate. An officer of the subordinate lodge, called a "financier," is to send written or printed notice of the assessment to each member assessed, and, upon the failure of any member within the specified time to pay his assessment, he forfeits all rights under his certificate. The financier is required to keep a book wherein all assessments for the beneficiary fund shall be entered against each member holding a valid certificate. He is also required to furnish the recorder of the lodge the names of members in arrears upon assessments, and the recorder is to place these names on the minutes of the lodge, and to mark the certificates of such members as suspended on the certificate registry book. So far as the return in this case shows, no form or mode of making an assessment is prescribed, and no record thereof required to be made, except by the financier in the book kept by him. To fix a member's duty to pay an assessment, these are the essential things: A death by reason of which an assessment may be made; notice of the death to the grand recorder; the notice before mentioned to the subordinate lodge; an assessment in fact; and notice thereof by the financier to the member. As the duty to make the assessment is imperative, and no form or mode of making it is prescribed, and no record of it is required to be kept, except in the financier's book, it is not necessary that such assessment be formally made by the lodge, or that it be entered in the lodge minutes, though that would doubtless be the better way of preserving evidence of the fact. Hence such assessment may be proven by parol, and the evidence of it produced upon this trial was sufficient to go to the jury.

3. And so was the testimony as to the sending of notice to Backdahl. The financier, whose duty it is to forward notices, could not and would not testify, positively and specifically, that he mailed a notice to Backdahl, but he swore to sending notices of this particular assessment to all of the members of the lodge, as he supposed, and as he evidently intended

to do, including notice to Backdahl, "if he was not overlooked." From this the jury might find that notice was sent to Backdahl. *Skilbeck v. Garbeck*, 7 Q. B. 846; *Ward v. Londesborough*, 12 C. B. 252; 1 Greenl. Ev. § 40; 2 Whart. Ev. § 1330.

4. But there was not sufficient evidence to go to the jury as to the suspension for non-payment of dues, alleged in the second defense, and the court erred in refusing an instruction requested by the plaintiffs that the second defense had not been made out. In *Scheufler v. This Defendant*, (Minn.) 47 N. W. Rep. 799, we had for consideration those provisions of defendant's constitution which provide for suspension for non-payment of assessments and suspension for non-payment of dues. It was held that the former operate *ipso facto* upon default of the member, and without any action on the part of the lodge, or of any officer thereof, while the latter require the action and determination of the lodge or an officer thereof. In other words, that a failure to pay an assessment of itself, and without further ceremony, suspends the member, while a failure to pay dues gave cause for suspension

only, and, as suspension for non-payment of dues is in the nature of a forfeiture, the lodge cannot, under its constitution, declare it without notice to the member, giving him an opportunity to be heard in opposition. There was no testimony tending to show such notice or opportunity.

5. It was claimed upon the trial of the case, as well as upon the argument of this appeal, that Backdahl had voluntarily withdrawn, had discontinued his connection with the subordinate lodge. The evidence produced in support of this claim was abundant, but such a defense was not alleged in the answer, and there is nothing in the settled case indicating that plaintiffs consented to try such defense, although not pleaded. However, all of the testimony which was received bearing upon the question was admissible and pertinent upon the defense of suspension for non-payment of the assessment, alleged in the first defense. Order reversed.

VANDEBURGH, J., absent on account of sickness, took no part. MITCHELL, J., not being present when this decision was made and filed, did not participate.

SULLIVAN v. STATE.

(6 Tex. App. 319.)

Court of Appeals of Texas. June, 1879.

Appeal from district court, Gonzales county; E. Lewis, Judge.

Harwood & Winston and Fly & Davidson, for appellant. Thomas Ball, Asst. Atty. Gen., for the State.

WINKLER, J. This is an appeal from a judgment of conviction of murder in the first degree, imposing the death penalty. The most important and interesting inquiry here presented for consideration may be stated to be substantially as follows:—

The appellant having been accused of the murder of a woman, described in the indictment as one "Harriet (a freedwoman, whose name other than Harriet is to these grand jurors unknown)," soon after the homicide was arrested and taken before the county judge of Gonzales county for examination, on which examination a witness called Owen E. Dean testified; and on the trial at which the conviction was had, the witness Dean not being in attendance, counsel for the state proposed to reproduce his testimony taken before the county judge on the preliminary examination, and for this purpose placed on the stand as a witness one Ed Titcombe, who qualified himself to testify in the following manner, as set out in the statement of facts: "He was deputy clerk of the county court, and was present at an examining trial held by John S. Conway, county judge of Gonzales county, on the 11th day of July, 1877. The examination was held for the purpose of ascertaining whether or not defendant, Thomas Sullivan, should be committed to jail, he being charged with the killing of the woman Harriet, and the examination being had to ascertain the facts in that case. The defendant, Thomas Sullivan, was present, and had an opportunity to cross-examine the witnesses. He was asked by Judge Conway if he desired to cross-examine the witnesses, and was so asked in relation to each witness. Owen Dean was sworn as a witness in said examining court by me, and testified in the case, after being threatened with punishment by the court for refusing to testify. I took down his testimony. It was reduced to writing, and he signed his statement 'Owen E. Dean.' I can state substantially all that said Owen E. Dean testified to on said examination. He (Titcombe) was then presented with the written statement at said trial, and was going on to state Dean's testimony, when counsel for defendant suggested that he had better read the evidence from the record, which was done, and the witness stated as follows." Here follows what purports to be the statement of Dean, as given by him on the examination before the county judge.

This testimony was admitted over ob-

jection by defendant's counsel, on the following grounds, as set forth in a bill of exceptions, to wit: "(1) Said witness had not been put under the rule with other witnesses for the state, but had been in the court room during the trial. (2) Because it had not been proven that Owen E. Dean was dead. (3) Because it was not shown that Owen E. Dean was beyond the jurisdiction of the court, or was even residing permanently out of the state. (4) Because it was not proven that the pretended statement of Owen E. Dean was made in any court having any manner of jurisdiction over the cause or over the defendant. (5) Because it was not proven that the said purported statement of Owen E. Dean was made by said Dean under oath, and it was not shown that the pretended confessions made by said defendant to said Dean were voluntarily made." All of which objections, the bill of exceptions recites, were overruled by the court.

It is further shown by the statement of facts and by a bill of exceptions that certain testimony of a witness named Smeed was admitted over objection by defendant. The testimony of the witness Smeed was substantially as follows: The witness knows Owen Dean. Don't know his middle name, or that he had any. He was here for several months, to see after his brother, who was in jail, charged with murder. He was here from January until August of last year. He went away out of this state. I wrote a letter to the postmaster at Marion, Massachusetts, inquiring for Owen Dean. I got a reply, he says, saying that Dean was at Boston, Massachusetts. Among his friends and acquaintances it is generally understood that he is at Boston, Massachusetts. He said that Dean came here from Boston, Massachusetts.

The grounds of objection to this testimony, as set out in the bill of exceptions, were: First. The testimony does not show that the man Owen E. Dean was beyond the jurisdiction of the court, or that he was even living beyond the jurisdiction of the state. Second. That said evidence was hearsay. Third. That the letter of which witness spoke was better evidence than witness's statement as to the contents of said letter. Fourth. The letter referred to by witness was in regard to Owen Dean, and not Owen E. Dean; and because the man known here as Owen E. Dean was not known in Massachusetts by that name.

Another bill of exceptions recites that the defendant offered a witness to prove that the man called Owen E. Dean was under an assumed name, and not Dean; and also to prove that the man called Owen E. Dean stated to the witness that when the defendant made the pretended confession of guilt to him, said Dean, about which witness Titcombe had testified, that he (defendant) was laboring under delirium tremens, caused by

excessive drink; which was ruled out, on objection by counsel for the state, and the ruling saved by bill of exceptions.

We have stated some of the questions presented by these bills of exception with, perhaps, unnecessary particularity, for the reason that to state them plainly is to show their insignificance with reference to all that is said concerning the name of the man called Dean. We have no concern as to whether he was passing under an assumed name or not, or whether he had a middle initial letter in his name or not. The only concern the court and jury could have had was, not with the name, but with the identity of the witness who testified in that name before the examining trial before the county judge, and as to his identity there seems no room for controversy. As a general rule of law, a middle name is treated as of no consequence whatever.

The first question here presented is this: Was the county judge lawfully authorized and empowered to hold what the law denominates an examining court? We do not propose to discuss the question further than it relates to conserving the public peace and the subject of commitment, and release on habeas corpus after arrest, without inquiring into the general subject of jurisdiction, this not being deemed of controlling influence in the present inquiry.

It will be remembered that from the time Texas first threw off the Mexican yoke and organized civil government under Anglo-American ideas and auspices, a part of the machinery of government was the organization of counties, and placing at the head of the judicial authority of each county a judicial officer. It was provided in the constitution of the republic of Texas that "the republic shall be divided into convenient counties," and "there shall be in each county a county court." Const. Rep. art. 4, §§ 10, 11. And by act of December 20, 1836, the office of chief justice was created, and it was declared that the county courts should consist of one chief justice. Pasch. Dig. note 454.

Starting from this standpoint, we find, by noticing the several provisions of the several constitutions and legislative enactments, that from that early day, through the various changes, down to the present time, there has ever been, as a part of the judiciary, the distinct feature of a county court, presided over by a magistrate, and which feature has been maintained notwithstanding that the scope and extent of the jurisdiction has not in many respects been uniform, nor the presiding officer called by the same name; and whether the officer has been called by one name or by another, the court has been the same, and has maintained characteristics peculiarly its own. We will also constantly see that when the appellation of "county judge," "chief justice," or of "presiding justice" is used, it invariably applies to the presiding officer of

the county court; and hence we find, further, that when the legislature, in enacting a statute, refers to the presiding officer of the county court, the appellation in use at the time is the one employed in speaking of him.

Now, when our Codes were enacted, where reference is made to this official, the appellation of "chief justice" is usually employed, because that was the name by which he was at the time known; not to indicate any particular functions, for these are otherwise prescribed, but simply the presiding officer, the chief of the county court. Bearing these things in mind, we need not be misled by the terms employed by the Code when speaking of this official in connection with officers, peace officers, magistrates, and examining courts, and their authority over the subjects of crime, bail, and the like, and by which effect can be given to the various provisions on these subjects, in harmony with the manifest intention of the legislature and with established rules of applying such legislative enactments.

Some of the provisions of the Code of Criminal Procedure will be noticed:

"Art. 25. The provisions of this Code shall be liberally construed, so as to attain the objects intended by the legislature,—the prosecution, suppression, and punishment of crime."

"Art. 32. It is the duty of every officer known to this Code as a 'magistrate' to preserve the peace within his jurisdiction, by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders by the use of lawful means, in order that they may be brought to punishment.

"Art. 33. A chief justice of a county who, when legally applied to, refuses to issue process, or who knowingly and corruptly refuses to discharge a duty imposed upon him by the provisions of this Code, is guilty of an offence for which he is subject to removal, upon trial and conviction."

"Art. 52. Either of the following officers is a 'magistrate' within the meaning of this Code: The judges of the supreme court, the judges of the district courts, the chief justice of the county," etc.

"Art. 55. When a magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an 'examining court.'"

"Art. 248. Upon examination of a person accused of a capital offence, no magistrate, other than a judge of the supreme or district court, or chief justice of a county, shall have power to discharge the defendant," etc.

"Art. 249. When it is made to appear, by complaint on oath, to a judge of the supreme or district court, or chief justice of a county, that the bail taken in any case is insufficient in amount, such judge or chief justice shall issue a warrant of arrest, and require of the defendant additional security, according to the nature of the case."

Many other articles might be cited where the term "magistrate" is used, when the term would apply as well to the chief judicial county officer as to a judge of the district court; but these will be sufficient, not only to show the importance of this magistrate in a proper enforcement of the provisions of the Code, but also the trouble and confusion which would ensue by any other interpretation of these several articles of the Code than the one here intimated, and would render nugatory many of the provisions of the Code, so far as any county officer is concerned.

In support of this application of the term "chief justice," and strengthening our conclusions that the appellation was intended to apply to the chief judicial officer of the county, we find, on an examination of the Revised Code adopted at the recent session of the legislature, that the term "county judge" is inserted in the revision wherever the term "chief justice" is employed in the original in corresponding articles. So that, when the Revised Code goes into effect, the confusion will disappear, until some future legislature shall change the name of the county judge to some thing else by unguarded enactment. It is further worthy of note that, so far as the articles of the Code which relate to the prevention and suppression of crime are concerned, and the definition of the terms "magistrate" and "peace officer," we know of no material changes until the revision mentioned, which has not as yet gone into effect.

Our conclusions, therefore, are that, in so far as the provisions of the Code of Criminal Procedure relating to the subjects above set out are concerned, and which speak of the principal county judicial officer as chief justice, they are intended to apply to the judge who by law presides over the county court, and that it is altogether unimportant what particular name or appellation may be given him; and that, under the provisions of the Code, that county official, whether called "county judge," "chief justice," or "presiding judge" or "justice," or by whatever name he may be called, to distinguish him from other magistrates, was and is authorized and empowered to hold an examining court.

In the present case we are of opinion that the county judge had authority to inquire into the accusation against the appellant, and to either swear the witnesses himself or cause it to be done by the clerk or deputy clerk, and cause the same to be taken down in writing, and subscribed and sworn to by the witness Dean; and that, so far as the question of jurisdiction is concerned, the court did not err in admitting the testimony.

The next important inquiry is, was it competent for the state to prove, under the circumstances disclosed by the record, what the witness Dean had testified to before the examining court?

The constitution (article 1, § 10, Bill of Rights) declares that "in all criminal prose-

cutions" the accused "shall be confronted with the witness against him." The Code of Criminal Procedure (article 24) provides that "the defendant upon a trial shall be confronted with the witnesses, except in certain cases, provided for in this Code, when depositions have been taken." In treating of constitutional provisions similar to the one above set out, and found in all the constitutions of the several states and in that of the United States, Mr. Cooley lays down as the correct rule, deducible from the authorities, and which we adopt as correct, the following:

"The testimony for the people in criminal cases can only, as a general rule, be given by witnesses who are present in court. The defendant is entitled to be confronted with the witnesses against him; and if any of them be absent from the commonwealth, so that their attendance cannot be compelled, or if they be dead, or have become incapacitated to give evidence, there is no mode by which their statements against the prisoner can be used for his conviction. The exceptions to this rule are of cases which are excluded from its reasons by their peculiar circumstances; but they are far from numerous. If the witness was sworn before an examining magistrate, or before a coroner, and the accused had an opportunity then to examine him; or if there were a formal trial, on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned, but appears to have been kept away by the opposite party." Cooley, Const. Lim. pp. 363, 364.

Agreeably to Mr. Greenleaf, "upon the question whether this kind of evidence is admissible in any other contingency except the death of the witness, there is some discrepancy among American authorities." 1 Greenl. Ev. § 163, note. The rule in the text appears to be that: "When the testimony was given under oath, in a judicial proceeding in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any suit between the same parties. It is also received if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick and unable to testify, or has been summoned, but appears to have been kept away by the adverse party. But testimony thus offered is open to all the objections which might be taken if the witness were personally present."

There has also been controversy as to whether these rules apply to other than civil causes, and the position that they do not apply to criminal cases has been strenuously and ably maintained; but it seems now to

be settled that these rules apply to civil and criminal cases alike, so far as reproducing the testimony of a deceased witness is concerned. Whart. Cr. Law, § 667, note c, and authorities there cited. "The testimony of a deceased witness given at a former trial or examination may be proved at a subsequent trial by a person who heard him testify." Id. § 667. To this extent the question is not an open one in this court. In *Black v. State*, 1 Tex. App. 368, it was held that, at a second or subsequent trial of a criminal charge, it is competent for the prosecution to put in evidence testimony given at a previous trial by a witness who has since died; and such testimony may be proved by a witness who heard it given in, and who can qualify himself to state the substance of it. In *Johnson v. State*, 1 Tex. App. 333, it was, after mature consideration, held that the rules and practice of the common law have been substantially adopted by our Code in respect to admitting as evidence for the prosecution the deposition of a deceased witness, duly taken on a former trial of the accused by a court or an examining magistrate, and that the act of 1866 (Pasch. Dig. art. 6605), which expressly secures to the accused the right to use such evidence, does not abrogate or impair that of the state to use such testimony.

But the question here is, not as to the right to reproduce the testimony of a deceased witness taken at a former trial, but the right here claimed and exercised by the state is to prove the former testimony of a living witness; or, at least, one who is not shown or claimed to be dead, but who, it is claimed, is not within the jurisdiction of the court or its process. It is not perceived that the reason of the rule which admits proof of what a deceased witness had on some former occasion, between the same parties, on an examination into the same criminal charge, on a former trial, testified to, as admissible on a subsequent trial of the same case, does not apply with equal force to one who, though not dead, is beyond the reach of the process of the court. The testimony of the deceased witness is admitted on the idea that the deceased had been confronted with the witness on the former trial,—had met him face to face,—and that the witness had testified before a competent tribunal, under the sanction of an oath, and an opportunity afforded for cross-examination.

The inaccessible witness has been subjected to the same ordeal, the only difference being that the one is dead and the other out of reach. Each has confronted the accused, testified under the sanction of an oath, duly administered; and as to each, an opportunity for cross-examination has been afforded. According to Mr. Bishop, the principle on which these depositions are—under statutes like those which prevailed in England down to a recent period—admissible is that, being regularly taken under provision of law, the

common law accepts them when it is impossible the personal presence of the witness can be had. 1 Bish. Cr. Proc. § 1096. It is, however, plain, in matter of judicial reason, that this right to introduce the deposition grows out of the great doctrine of necessity. * * * And in practice it was never known that the sort of depositions thus mentioned were received when the living presence of the witness could be had. Id. §§ 1098, 1099.

The principle applies, not only to these formal depositions, but likewise to evidence of what a witness testified orally at a previous trial. It, moreover, prevails not only in civil causes, but in criminal; and, in general, in the United States as well as in England. There are with us, perhaps, some judicial localities in which this doctrine is not received. * * * But the admission of the evidence is limited, or nearly so, to the case in which the witness is deceased; and in this case it is the general American doctrine to receive equally the depositions taken as before mentioned, and evidence of the former, or oral, testimony. If the witness is absent by the procurement of the defendant, it is, perhaps, the American doctrine, the same as it is the English, that the deposition, or evidence of his former testimony, may be received against him. But when the witness is without this element, merely in another state, or otherwise beyond the power of the court, this is not sufficient. 1 Bish. Cr. Proc. § 1098.

These and similar rules—deduced, as they are, from adjudications in other states and countries—are of necessity based upon, and influenced more or less by, statutory regulations, and liable to be modified and controlled thereby, and with us must be held in subordination to whatever local statute, if any, we have on the subject. Here we have a statute which provides that "the rules of evidence known to the common law of England, both in civil and criminal cases, shall govern in the trial of criminal actions in this state, except when they are in conflict with the provisions of this Code or some statute of this state." Code Cr. Proc. art. 638. "The rules of evidence prescribed by the statute law of this state in civil suits shall, so far as applicable, govern also in criminal actions, when not in conflict with the provisions of this Code or of the Penal Code." Id. art. 639. "In proceedings before an examining court, the testimony of all the witnesses shall be reduced to writing, signed by them with their names or marks, and all the testimony thus taken shall be certified to by the magistrate." Id. art. 238. "The examination of witnesses shall be in the presence of the accused." Id. art. 240. "Should no counsel appear either for the state or the defendant, the magistrate may examine the witnesses, and the accused has the same right." Id. art. 247.

"In all criminal prosecutions, when the tes-

timony of a witness has been reduced to writing, signed, and sworn to before an examining magistrate, or before any court, and the witness has died since giving his testimony, the testimony so taken and reduced to writing may be read in evidence by such defendant, as proof of the facts therein stated, upon any subsequent trial for the same offence: provided, however, that in all other respects the testimony of such deceased witness shall be subject to the established rules of evidence in criminal cases. In every case, the death of the witness must be established to the satisfaction of the court." Pasch. Dig. art. 6005. Whilst this seems to be a privilege granted to the accused, yet, as we have seen in *Johnson v. State*, 1 Tex. App. 333, by the rules of practice the prosecution virtually has the same privilege. And whilst the provisions of this article, as well as the ruling in *Johnson's Case*, have reference to the testimony of a deceased witness, as we have already seen, the reason for the rule applies as well to a witness whose personal presence cannot be had, and that the testimony of a witness who had been spirited away after having testified ought to be received.

Yet, inasmuch as this species of testimony is admitted as a sort of judicial necessity, the proof of the facts which constitute the necessity for the departure from general rules ought to be clearly established before the testimony is admitted; as that the witness is dead, that diligent inquiry has been made for him where it is most likely he would be found, or that the defendant had caused his absence. The proof on this subject should be complete and satisfactory, as the question of the sufficiency of this proof would necessarily be confided largely to the discretion of the judge, and not be revisable on appeal when properly exercised.

On the whole, we are of opinion the authorities warrant the following conclusions: First. That a county judge is a magistrate authorized to hold an examining court. Second. That when a witness has testified before an examining court on the investigation of a criminal charge against any person, the testimony taken before such examining court, in the manner prescribed by law, may be used as testimony on the trial, upon satisfactory proof being first made that the witness whose testimony is offered has either died since testifying, or been prevented from attending by the opposite party, or that he cannot, after diligent inquiry, be found, or his whereabouts ascertained; and that the testimony so taken and reduced to writing before an examining magistrate may be used either by the prosecution or by the accused. Third. That when a witness has testified on a former trial of the case, it is competent for either party to prove what the witness, if he has since died, testified on the former trial. And, fourth, that, in either case the bare fact that the witness was out of the state at

the time of the second trial would not, of itself, be sufficient ground for admitting proof of his former testimony in a criminal prosecution, unless admitted by consent.

Applying these rules to the case at bar, we are of opinion the prosecution had a right to read as evidence on the trial the testimony of the witness Dean, given in the examining court before the county judge, and that the better evidence as to what he testified would have been the production of the written testimony so taken; and on this account we see no error, as it appears that the witness Titcombe read from the written statement of the witness Dean, taken on the preliminary examination before the county judge.

Yet we are of opinion that the absence of the witness Dean was not sufficiently accounted for at the trial to allow the introduction of his testimony taken before the examining court. The evidence upon which Dean's testimony was admitted was that of the witness Smeed, hereinbefore, set out, which need not be repeated, and which is mentioned in the second bill of exceptions taken to the admission of Smeed's testimony. To our mind, the tangible defect in this testimony is the want of any showing of proper effort to ascertain the fact as to whether the witness Dean could be produced on the trial, or not; whereas it should have been shown that it was not in the power of the state to produce the witness in person, before admitting his former testimony. One main ground of the statement of the witness Smeed appears to have been based partly upon a letter, which was not even produced on the trial. We are of opinion the showing, taken as a whole, did not show either that any proper effort had been made to learn the whereabouts of the witness Dean, or to show the inability of the prosecution to produce him in person on the trial. This was a matter of great moment to the accused. He did not stand by in silence and permit the error to be committed without objection; on the contrary, he objected to the proceeding at the time, and also followed it up by bill of exceptions, and in his motion for a new trial, and in his assignment of errors, substantially; and for this error, which is the turning-point in the case, the judgment must be reversed.

It is shown by bill of exceptions that the defendant offered to prove by a witness (Parker) that the witness Dean was passing under an assumed name. There was no error in excluding this testimony; it was but hearsay.

We are of opinion the objections to the charge of the court are not well taken. In the main, the charge correctly informed the jury on the law of the case as made by the evidence, and there was no important omission. Whether this would be a proper charge on another trial or not depends upon the case and the testimony as the same shall be developed. If the charge should need

modification or enlargement, these will readily suggest themselves when the occasion arises. There is nothing further suggested by the record requiring any special ruling.

For the single error above set out, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

STATE v. REED.

(37 Pac. 174, 53 Kan. 767.)

Supreme Court of Kansas. July 6, 1894.

Appeal from district court, Cowley county; A. M. Jackson, Judge.

Isaac G. Reed was convicted of murder in the second degree, and appeals. Reversed.

Chas. E. Elliott, C. J. Peckham, and Isaac Reed, for appellant. John T. Little, Atty. Gen., C. J. Garver, and W. W. Schwiun, for the State.

JOHNSTON, J. Isaac G. Reed was charged in an information filed in the district court of Sumner county with shooting and killing Isaac Hopper, in Sumner county, in such a manner and with such an intent as to constitute murder in the first degree. The information was filed on August 31, 1892, and on October 10, 1892, upon application of the defendant, a change of venue was granted, and the cause transferred to the district court of Cowley county for trial. The trial was begun in the latter court on January 10, 1893, and, after the impaneling of the jury, the production of the evidence for the state and for the defendant, the charging of the jury, after the opening argument in behalf of the state and the argument in favor of the defendant, and before the closing argument for the state had been completed, on January 20th, one of the jurors became sick, and was unable to attend at the trial. The cause was continued from time to time for five days, and on January 26th, after an examination, and without the consent of the defendant, the court determined that it was impossible for that jury to conclude the trial, and thereupon it discharged the jury. At the next term of the court the plea of former jeopardy was interposed, and attached to it was the evidence taken by the court when the first jury was discharged; but the court sustained a demurrer, and ruled that, the discharge of the jury having been made necessary by the sickness of a juror, it did not operate as a bar to a further trial. The trial then proceeded, and the defendant was convicted of murder in the second degree, from which conviction he appeals to this court, alleging numerous grounds of error. We will only notice those which seem to be material or require attention at this time.

The first contention is that the discharge of the jury first impaneled is equivalent to a verdict of acquittal. It is true that the jeopardy of the defendant began when the jury were impaneled and sworn and the reception of evidence was commenced; and it is also true that the discharge of the jury without the consent of the defendant, and without sufficient reason, will ordinarily bar a further trial. The statute prescribes the grounds which will warrant the court in discharging a jury before the completion of a trial. It reads as follows: "The jury

may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing." Civ. Code, § 281; Cr. Code, § 208. In this case the sickness of a juror was the cause for discharge, and whether that sickness was of such a character as to make a discharge absolutely necessary was the subject of inquiry and decision by the court. A court cannot arbitrarily determine such a question, but the incapacity of the juror, and the necessity for discharge, are to be heard and determined by judicial methods. *State v. Smith*, 44 Kan. 75, 24 Pac. 84. That course was pursued in the present case, and the finding made by the court that such a necessity existed was based on the testimony of a physician and other evidence, some of which is not preserved. In the absence of that evidence, we cannot say that there was not good cause for the discharge. From what appears, we think that the court did not act capriciously, nor without a due regard for the rights of the defendant. After the illness of the juror was reported, the court postponed the trial from day to day in the expectation that the juror would recover sufficiently to complete the trial. Several inquiries were made as to his condition, and the prospect of recovery. At the end of five days he was still seriously sick, and his recovery was a matter of great uncertainty. It is said that the near approach of the end of the term influenced the court to some extent in reaching the conclusion which it did. Of itself, this might not be sufficient to justify a discharge, but, as the real inquiry was whether the sickness of the juror required the jury to be discharged, the finding of the court made upon this inquiry is necessarily binding upon us. As the testimony taken at the time of the discharge was made a part of the plea, and a demurrer thereto sustained, the question raised upon the reply to the plea is not deemed material. *

Upon leave of the court, obtained without notice to the defendant, the state was permitted, at the time of the trial, to indorse upon the information the names of eight witnesses who gave material testimony in the case. This indorsement was made just before the trial, on April 5th, and it is contended that, as the testimony given by these witnesses was important, the action of the court in permitting the indorsement was an abuse of discretion, which resulted in prejudicing the rights of the defendant. It appears that on the 3d day of February a motion was made to indorse the names of the new witnesses, which motion was sustained by the court. Afterwards the names of these witnesses so indorsed were stricken from the information, and it was said that it was done upon the ground that the order for indorsing the names of witnesses was made in

the absence of the defendant. It thus appears that the attention of the defendant and his attorneys was called to these witnesses; and, further, that inquiry had been made of them as to what their testimony would be. Under the circumstances it cannot be said that the court exercised its discretion without due regard for the rights of the defendant, or that he was prejudiced by the ruling.

Three jurors were challenged on the ground that they did not possess the requisite qualifications of jurors. The objection urged is that their names did not appear on the tax rolls of the county, and hence that they should have been excluded from the panel upon the objection of the defendant. The showing made upon this point is not satisfactory. While it appeared that these jurors did not pay any personal taxes for the preceding year, it was not shown that they did not pay taxes on real estate, nor that their names did not appear on the assessment rolls of their respective townships. It appears that two of them were listed for personal taxes, but that the value of the personal property which each had for taxation did not equal the exemption allowed to him; and, in the case of the third, he stated that he had made a return for a stock company as its manager and agent, but that he had not been assessed for personal taxes. Whether he was upon the tax roll is not shown. No inquiry was made as to whether they had real estate listed in their names in the respective townships in which they lived, and nothing to show that they did not pay taxes on real estate for the preceding year. The statute provides for listing both personal and real estate in the name of the owner. Gen. St. 1889, pars. 6889, 6911. It is further provided that in making a list of persons to serve as jurors the jury commissioners shall select from those assessed on the assessment rolls of the several townships and cities of the preceding year. *Id.* pars. 3567, 3601. The evident purpose is to obtain the service of jurors who are substantial citizens and the owners of property, and the assessment rolls referred to in the jury law are evidently those made in the listing of both real and personal property. As it does not appear that they were not upon the personal property assessment rolls, nor that they did not own and pay taxes on real estate, this objection must be overruled. *State ex rel. Kellogg v. Commissioners*, 44 Kan. 528, 24 Pac. 955. Other objections were made with reference to the jury, but an examination discloses that they are not material.

The next complaint relates to the ruling of the court in admitting what was received as the dying declaration of the deceased. Hopper was shot by Reed about 5 o'clock on the evening of May 21, 1892, and soon afterwards was carried to his home, where an examination of his wound was made by physicians and surgeons, who informed him that

his injury was fatal, and admonished him that, if he had any business matters which required attention, he should attend to them, as he could not live long. He repeatedly expressed the opinion that he was about to die. A minister of the gospel was called in. He requested a neighbor to act as guardian for his children, gave information about insurance on his life, and directed how it and his property should be applied. He suffered intense pain, and at times cried out, "I am dying now." A stenographer was sent for, and a dying statement as to the shooting, and the cause of it, was taken down, which was afterwards introduced in evidence. Some time after the statement was given he rallied some, and used language which indicated that he was then not without hope of recovery; but soon afterwards he expired. It is claimed that under the circumstances the statement should not have been received in evidence. It is clear that the statement was made in the belief of impending death, and the fact that there was an interval of several hours between the time the statement was made and his death does not make it inadmissible. Nor will the fact that at times after the statement was made he entertained or expressed a hope that he might get well render his declarations incompetent. The controlling question is whether the declarations were uttered under a sense of impending dissolution; and the fact that death did not immediately ensue, or that a hope of recovery was subsequently entertained, will not affect their admissibility. 6 Am. & Eng. Enc. Law, 117.

The admission of testimony showing the relations existing between the defendant and the wife of the deceased, and which tended to show a criminal intimacy between them, is assigned as error. The defendant admits that proof of a criminal intimacy between the defendant and the wife of the deceased is admissible to show the existence of a motive for the killing, at least in cases where the killing has to be established by circumstantial evidence; and he insists that, as the killing was admitted, the motive of the defendant could be shown in a general way, but that a detailed inquiry would create new issues, and tend to divert the minds of the jury from the consideration of the principal issue; the theory of the prosecution being that the homicide was committed by the defendant because of the passion which he entertained for the wife of the deceased, of which the deceased had knowledge, and that, as he stood in the way of defendant carrying out his desires and purposes, testimony of the relations which existed between them was competent upon the question of motive. Counsel for the state say that it has been "universally conceded, since David wrote to Joab, 'Set ye Uriah in the forefront of the hottest battle, and retire ye from him, that he may be smitten and die,' that the

man who coveted his neighbor's wife had a motive for desiring the death of his neighbor." The evidence is not only competent as tending to show the motive which induced the crime, but it is important also in determining the degree or grade of the crime that has been committed. As a general rule, testimony tending to show the commission of another offense is not admissible, but, where such offense is intimately connected with the one charged, important proof to establish the latter cannot be excluded because it may tend to prove that the defendant is guilty of another offense. *State v. Folwell*, 14 Kan. 105. There may be some cause for complaint at the very extended inquiry that was made as to the relations between the defendant and Mrs. Hopper. A detailed inquiry was made, and a large volume of testimony was taken. It may be said, however, that this was due to a large extent to the fact that an undue intimacy between these parties was denied by the defendant. The testimony of the illicit relation, however, if it existed, was receivable in evidence as tending to show the motive of the defendant in killing the deceased. *Johnson v. State* (Fla.) 4 South. 535; *Pierson v. People*, 79 N. Y. 424; *Com. v. Merriam*, 14 Pick. 518; *State v. Lawlor*, 28 Minn. 216, 9 N. W. 698; *State v. Hinkle*, 6 Iowa, 350; 9 Am. & Eng. Enc. Law, 714; 15 Am. & Eng. Enc. Law, 936.

A more serious objection is made to interviews and conversations held with the deceased some time prior to the shooting, when the defendant was not present, and of which he had no knowledge. A witness was permitted to detail at length a meeting between himself and Hopper on the day before the shooting; the taking of a long drive with the deceased, during which he related to the witness his troubles at Wellington, and his plans for leaving that place and going to Missouri. He was allowed to testify what the mood and manner of the deceased were on that day, and to relate the reason given by the deceased for leaving Wellington. The reason stated was the interference in his family, and the trouble made by the defendant. Another witness, over objection, related that he had met the deceased on the next day, and had a conversation with him, in the absence of the defendant, in which the deceased informed him, among other things, that he had determined to go to Missouri, and the reason given was "that if he could get his wife away from where Judge Reed was, they could get along all right together." The acts and conduct of the deceased previous to the fatal encounter which formed a part of the *res gestae*, or which tended to throw light upon the question of motive or malice, might be admitted in evidence; but the acts or conduct of the deceased which are not a part of the *res gestae*, and which could not have influenced the defendant in the commission of the homicide, cannot be shown. The

manner and conduct of the deceased on the day previous to the killing was not known to the defendant, and was not connected with the homicide, and therefore the defendant could not be affected thereby. Anything that would throw light on the homicide, and everything that would operate on the mind of the defendant, can be shown; but evidence of the acts or manner of the deceased which never came to the knowledge of the defendant, could not be proved.

There was introduced in evidence a paper, identified by Mrs. Hopper, in which the deceased declared that he believed his wife to be a woman of honor, integrity, and high moral character, and that any accusations to the contrary were false. To meet the introduction of this evidence by the defendant the state was permitted to offer a witness who related an occurrence between himself and the deceased on May 1st,—the day upon which the other paper was executed,—in which the deceased presented to him a paper which he said was prepared by Mrs. Hopper. He then gives a conversation between the deceased and himself with reference to the paper and its contents. After reading it over, the witness told the deceased that he would be a fool to sign it; that the paper was not prepared by Mrs. Hopper, but was prepared for the purpose of getting a divorce from him. A long conversation ensued, in which it was intimated or would bear the construction that a trap was being laid by the defendant and the wife of the deceased, so that, if trouble occurred, or a divorce was asked for, the mouth of the deceased would be closed; and much of the contents of the paper was disclosed in the conversation. This testimony was wholly incompetent, and the objection of the defendant should have been sustained, and the motion to strike it out should have been allowed. If the testimony had been competent as an explanation of why the paper signed by the deceased came to be executed and delivered to his wife, it was still secondary evidence, and, if competent at all, the letter itself should have been produced, or its nonproduction accounted for. The paper itself, however, if in existence, was not competent proof, and the introduction of its contents was prejudicial error.

There is just ground for the complaint made by the defendant in permitting the state to cross-examine the defendant in regard to his early life. A great part of the testimony in the case was devoted to the question of whether the defendant sustained adulterous relations with the wife of the deceased, and on cross-examination he was required to relate the marital relations between him and his first wife, having been married in 1868; that he was divorced from her in the spring of 1877; and to state the grounds upon which the divorce was granted. The inquiry was pressed so far that he was required to state that cruelty and adul-

tery were charged against him, and an effort was made to show that his present wife was the co-respondent in that divorce suit with whom adultery was charged, and that he was engaged to his present wife prior to the granting of the divorce from his first wife. Some of these direct questions were not required to be answered, but the inquiry was pushed sufficiently far to leave the inference with the jury that the defendant had been guilty of another adultery with a person other than the wife of the deceased 15 years before the occurrence of the homicide with which he was charged. A full cross-examination should be allowed upon anything connected with the homicide, or which would affect the credibility of the defendant as a witness; but it is not competent to prove previous acts of adultery, which have no connection with the offense charged; nor can evidence of improper conduct with other parties than those charged in the information, which happened in his early life, be given in evidence to sustain the present charge. We think there was an abuse of discretion in this extended cross-examination of the defendant.

Another ground of complaint is the instruction given by the court with reference to the effect of the dying declaration which was admitted in evidence. The court charged that: "Such declaration, when made in the belief that death was imminent, and the deceased had abandoned all hope of recovery, is admissible; and in this case, if you should find from the evidence that the deceased made a declaration as to the encounter with defendant before his death, then the court instructs you as a matter of law that such declaration was made when the deceased thought death was imminent, and he had abandoned all hope of recovery." The court further advised the jury that the weight to be given to the declaration and the credibility of the witness making it, ought to be governed by the ordinary rules of evidence, and to determine the weight and credit to be given to the same the jury can consider all the circumstances under which the declaration was made. The objection is that the court withdrew from the jury all considerations as to whether the declaration was made when the deceased thought death was imminent, and after he had abandoned all hope of recovery. The court must decide, as a preliminary question, whether the declaration was made under a sense of impending dissolution, and the admissibility of the same is exclusively for the consideration of the court; "but, after the evidence is admitted, its credibility is entirely within the province of the jury, who, of course, are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give the testimony only such credit as, upon the whole,

they might think it deserves." 1 Greenl. Ev. § 160. While the court instructed the jury that they might take into consideration the circumstances under which the declaration was made, in another part of the charge the question of whether the deceased made the statement under the apprehension of speedy death was, in effect, excluded from their consideration. In passing upon the credibility of the statement the jury are entitled to consider whether, as a matter of fact, the deceased had lost all hope of recovery, and the instruction should have been modified in accordance with this view. *Starkey v. People*, 17 Ill. 17; *North v. People*, 139 Ill. 102, 28 N. E. 966; *State v. Cameron*, 2 Pin. 490; *Varndoe v. State*, 75 Ga. 181; *State v. Banister* (S. C.) 14 S. E. 678; *Lambeth v. State*, 23 Miss. 355; *Nelms v. State*, 13 Smedes & M. 506; *People v. Green*, 1 Parker, Cr. R. 11; *Walker v. State*, 37 Tex. 366; *Jones v. State*, 71 Ind. 66; *State v. Nash*, 7 Iowa, 347, 384.

Another complaint is with reference to an instruction given upon the subject of self-defense, in which the court told the jury that, if one is unlawfully attacked by another, he may stand his ground, and use such force as reasonably appears necessary to repel the attack and protect himself. The criticism is that the instruction given leaves the jury to infer that the appearances were to be judged by them, and not by the defendant. "A party assailed is justified in acting upon the facts as they appear to him, and is not to be judged by the facts as they are." *State v. Howard*, 14 Kan. 175. While the instruction is not as explicit as it should have been, it is evident from other portions of the charge that the court meant that he might use such force "as at the time reasonably appeared to him to be necessary." Although the instruction is defective, we would hardly think that the error of itself was sufficient to require a reversal. In any future trial of the cause this omission can be corrected.

There is a further complaint that the court failed to submit an instruction upon manslaughter in the second degree. As the instruction complained of related to a degree of crime inferior to that of which the defendant is convicted, this objection becomes immaterial. *State v. Dickinson*, 6 Kan. 209; *State v. Potter*, 15 Kan. 302; *State v. Rhea*, 25 Kan. 576; *State v. Yarborough*, 39 Kan. 588, 18 Pac. 474. Further than that, however, we think the testimony was not such as to justify the court in submitting an instruction as to that grade of offense.

Other criticisms are made upon the charge of the court, but in them we find no error, nor anything which requires further comment. For the errors referred to, the judgment will be reversed, and the cause remanded for another trial. All the justices concurring.

STATE v. KINDLE.

(24 N. E. 485, 47 Ohio St. 358.)

Supreme Court of Ohio. May 20, 1890.

At the October term, 1889, of the court of common pleas of Brown county, George W. Kindle was tried upon an indictment charging him with the murder of one Thomas Butt. On the trial, to maintain the issue on the part of the state, the prosecuting attorney offered in evidence a written statement purporting to be signed by Thomas Butt, purporting to contain a dying declaration by him of the circumstances immediately attending the crime, and relating to the identity of the perpetrator. Before offering the paper, the state called witnesses who testified to the satisfaction of the court that the said Butt, at the time the paper was written, and when it was signed by him, was under a sense of impending death, and had no hope of recovery, and that the paper was read over to him before he signed it. The statement was then, against the objection and exception of the defendant, admitted in evidence, and read to the jury. A verdict finding the defendant guilty of manslaughter having been rendered, the defendant filed a motion for a new trial on the ground, among others, that the court erred in admitting in evidence the written statement of Butt. On this ground alone the court sustained the motion. To this ruling the prosecuting attorney duly took a bill of exceptions, which upon leave was filed in this court "for its decision upon the points presented."

D. V. Pearson, Pros. Atty., for the State.
C. A. White and W. W. Young, contra.

SPEAR, J., (after stating the facts as above.) The question presented by the bill of exceptions is, did the court err in the admission as evidence of the written statement purporting to be a dying declaration? While some of the statements of the bill respecting the preliminary proof are not couched in the clearest and most positive language, yet it is fairly to be understood that the testimony of the witnesses satisfied the judge that the statement was prepared by one of the witnesses called, under the direction of the deceased; that it was by one of the witnesses read over to him, and was actually signed by him; and that at the time he was under a sense of impending death, and had no hope of recovery. The paper itself shows that it is a recital of the circumstances immediately attending the assault which resulted in Butt's death. It is not questioned that the words used by the defendant, or the substance of them, might have been testified to orally by those who heard them, if they were able to recall them; but it is insisted by counsel that to admit the written statement of the deceased is to make him a witness in the case, and is a violation of that clause of the constitution of the United States which provides that every person on trial, charged with crime, shall have the right "to be confronted with the witnesses against him," and of the like clause in our own

constitution which provides that in any such trial the party accused shall be allowed "to meet the witnesses face to face." It being conceded that what the deceased said is the substantive matter to be given to the jury, the only question is as to the proper mode of communicating from the declarant to the jury.

Dying declarations have been received in evidence on the ground of necessity, there often being no other evidence of the facts attainable, and sometimes on the further ground that the solemn circumstances surrounding the wounded person, in view of impending death, will create an obligation to utter the truth equal, in its influence, to the obligation of an oath, though it is difficult to see why, if the latter is a substantive ground, the declarations should be limited to the facts immediately connected with the killing. Mr. Roscoe, in his work on Criminal Evidence, observes that the concurrence of both these reasons led to the admission of this species of evidence. Page 33. Such declarations are in the nature of hearsay, and their admission is an exception to the general rule of evidence. It follows from this that the person making them is not, but the person by whom they are proven is, the witness. Hence the witness by whom the accused has the right to be confronted, is the one called to lay the foundation for proof of the declaration, and by whom the making of the declaration is established. The object is to give the accused the opportunity to see and hear the witness, and for cross-examination. If these objects are secured, the guaranty of the constitution is maintained. Applying these conclusions to the case at bar, how can it be said that the accused was deprived of any right? In order to intelligently prepare the paper signed by the declarant, it was necessary for the witness to first talk with him, or at least hear his verbal statement. Then, having reduced the statement to writing, he read it to the declarant, and it was then signed by him. All this must have been shown by the witness before the court could have been satisfied of the necessary facts preliminary to the admission of the paper. Being thus testified to, the whole transaction, and every detail, was the subject of cross-examination. The accused could inquire as to just what the declarant actually said, just how much care was taken in writing out the statement, how carefully and distinctly the paper was read to the declarant, and, in short, as to all that was said and done, the order of it, and the manner of it. Whether the accused availed himself of this opportunity or not, the opportunity was present. It is clear that in this case the constitutional requirement was complied with, and every constitutional right was preserved to the accused. Where this appears, the only question is, which is the preferable evidence of the actual declarations,—the memory of witnesses, and their ability to reproduce the words used, or the substance of them, or the paper, reduced to writing at the time, and signed by the party making the statement? Or, to present the exact question in this case,

is there such preference to be given the former method as to render the latter improper? We think not. The common judgment of mankind, formed upon observation and experience, is that the attempt to repeat the language of others is always attended with uncertainty. It is in recognition of this fact that the custom has obtained at trials for the judge to caution the jury in weighing and considering testimony of this kind. The witness may not have fully understood the declarant. He may not recollect accurately the words or their substance; or, having understood and remembering, he may not be able to fully and clearly express himself in their reproduction. At least the written statement, approved and signed by the declarant, is not, ordinarily, open to these objections. Nor can it be said that the paper so prepared and verified has not a legitimate tendency to prove the facts sought to be proven; that is, to show what the dying man said.

But, if we had doubts as to this conclusion, on principle, we would be impelled to the same result upon authority. The admissibility of dying declarations in cases of homicide has been recognized by the courts for more than a century, and the question of the form in which such declarations shall be given to the jury has often been under consideration. In *King v. Ely*, tried before Chief Justice King at Old Bailey, in 1720, (12 Vin. Abr. 118,) it was held that, "in the case of murder, what the deceased declared, after the wound given, may be given in evidence;" and in *Trowter's Case*, Id. 119, "the court would not admit the declaration of the deceased, which had been reduced into writing, to be given in evidence without producing the writing." To like effect is *Rex v. Woodcock*, 1 Leach, 500, (decided in 1789.) In *Rex v. Gay*, 7 Car. & P. 230, it was declared that if a declaration *in articulo mortis* be taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of the "declaration;" and COLERIDGE, J., refused to receive the parol evidence offered. Under the head of "Form of Declaration," Mr. Phillips, in his work on Evidence, (volume 1, p. 240,) uses the following language: "With regard to the manner in which a dying declaration may become the subject of legal evidence, it may be observed that an examination taken on oath by a magistrate, and signed by the deceased and by the magistrate, has been received in evidence as of the same effect in point of admissibility as declarations not made with the same solemnity." And in a note to page 241 occurs this: "Where the statement of the deceased is taken down in writing, it is of course more reliable, more accurate, than the memory of most men; but it is of no higher grade than unwritten testimony." Prof. Greenleaf in his work on Evidence (section 161) gives the rule that, "if the statement of the deceased was committed to writing, and signed by him, at the time it was made, it has been held essential that the writing should be produced, if existing." Mr. Wharton, in his work on Criminal Evi-

dence, (section 295,) thus states the rule: "If the declaration of the deceased, at the time of his making it, be reduced into writing, and then read and approved by him as giving his deliberate view, the written document becomes primary evidence." It was held by the supreme court of Iowa in *State v. Tweedy*, 11 Iowa, 350, that "when declarations *in extremis* are reduced to writing and signed by the person making them, the writing, if in existence, must be produced as evidence of such declarations." The admissibility of competent declarations, so evidenced, has been directly sustained in California, (*People v. Glenn*, 10 Cal. 32;) in Texas, (*Krebs v. State*, 8 Tex. App. 1;) in Arkansas, (*Collier v. State*, 20 Ark. 36;) in Mississippi, (*Merrill v. State*, 58 Miss. 65;) in Alabama, (*Kelly v. State*, 52 Ala. 361;) in South Carolina, (*State v. Ferguson*, 2 Hill, 619;) in Kentucky, (*Mockabee v. Com.*, 78 Ky. 380;) in Indiana, (*Binns v. State*, 46 Ind. 311;) and in Wisconsin, (*State v. Martin*, 30 Wis. 216.) And, inferentially, in Tennessee, (*Epperson v. State*, 5 Lea, 291;) and in Massachusetts, (*Com. v. Haney*, 127 Mass. 455.) That such written statements are not admissible as depositions has been several times held, as in the last-named case, but, if there are any holdings against their admissibility under the general head of dying declarations, our attention has not been called to them, nor have we found such in an extended search of authorities. At all events, there is, beyond doubt, a marked agreement in favor of their admissibility.

It is insisted that the written statement was a deposition, and that, as there has been no statutory provision, and under our constitution could not lawfully be such provision, for the taking of depositions for the state, the paper, on that ground, was inadmissible. But is it a deposition? In a certain general sense, any written statement, signed by a person, containing assertions of fact, may be treated as his deposition, and the term has been sometimes used in this sense by law-writers and judges. In law, however, its accepted meaning is limited to the written testimony of a witness reduced to writing in due form, by virtue of a commission or other authority of a competent tribunal, upon notice, or according to the provisions of some statute law. Besides, the scope and subject-matter of a deposition and a dying declaration may widely differ. A paper competent to be received in evidence as a deposition may be received in any case in which it is taken, and may contain statements as to any facts to which the witness, if on the stand in court, could have testified. A paper competent to be received as a dying declaration is receivable only in a case where the death of the deceased is the subject of the charge, and is limited in its statements to declarations respecting the immediate cause of the death. Again, a deposition, duly taken, proves itself; a paper containing a dying declaration must be identified and established by oral proof. This paper does not purport to be a deposition. It was not offered as a deposition. It has nowhere in these proceedings been treated as a depo-

sition. We think it cannot be now regarded as such.

Again, it is urged against the admissibility of this statement that, "as our experience teaches, there are many men who in the hour of death do not have the fear of God before their eyes, are filled with malice, hatred, and anger, which go out only with their lives, and are buried with them in their graves, and with whom a consciousness of impending death moves to a desire for revenge; and that such declarations, in a majority of cases, are prompted by such desire." But against his objection may be quoted the observation of Chief Baron EYRE, in *Woodcock's Case*, *supra*, to the effect that these "declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced, by the most powerful consideration, to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." However, it is manifest that, whatever force there may be in

the objection, it goes to the weight of the testimony, and not to its competency, and would be just as forcible, if not more so, against the admission of declarations proven by word of mouth. We are of opinion that in cases of homicide a statement of the injured person, made *in extremis*, while conscious of his condition, and under a sense of impending dissolution, reduced to writing by a competent person, at the instance of the declarant, or with his consent, approved and signed by him, containing statements of the circumstances of the unlawful act which results in death, after proper preliminary proof has been introduced, is admissible in evidence. Whether or not such paper is primary evidence in the sense that parol evidence of the declarations will not be received until the absence of the paper is accounted for, we are not called upon to determine. It follows that the court of common pleas did not err in admitting the written statement of Thomas Butt in evidence, and that that court did err in sustaining the motion for a new trial by reason of the introduction of the written statement. Exceptions sustained.

MAYOR, ETC., OF CITY OF NEW YORK
v. SECOND AVE. R. CO.

(7 N. E. 905, 102 N. Y. 572.)

Court of Appeals of New York. June 22, 1886.

Appeal from a judgment of the general term supreme court, First department, affirming verdict for plaintiff at circuit.

Austen G. Fox, for appellant, Second Ave. R. Co. D. J. Dean, for respondent, Mayor, etc., of the City of New York.

ANDREWS, J. The construction of the covenant of the defendant, the Second Avenue Railroad Company, contained in the instrument of December 15, 1872, to pave the streets "in and about the rails," in a permanent manner, and to "keep the same in repair to the satisfaction of the street commissioners," was considered in the Case of McMahon, 75 N. Y. 235, and it was held that the covenant bound the company to pave and keep in repair so much of the space between the tracks as was disturbed in the original construction of the road. Upon this construction of the covenant the defendant was bound to keep in repair the whole space between the tracks of its road on Second avenue, between Houston and Forty-second streets, as it was shown that, while the laying of the road originally would only require the actual displacement of the pavement for a distance of about 18 inches on the side of each rail, nevertheless it would so disturb the belt of intermediate pavement as to require it to be relaid. The trial judge therefore correctly ruled that the covenant extended to the entire space between the tracks.

It is insisted, however, that, conceding this to be the true construction of the covenant, the court erred in directing a verdict for the sum expended by the city, and for the value of the new materials used, as proved by the account kept by the city. The objection is twofold: First, that the rule of damages for a breach of a covenant to repair, where the covenantor has neglected to perform his covenant, and the repairs have been made by the covenantee, is the reasonable cost of the repairs, and not the sum expended by the covenantee in making them, and that the question of reasonable expense should, under the evidence, have been submitted to the jury; and, second, that improper evidence was admitted to prove the amount of labor and materials used in the work.

In reference to the first ground, it was shown, on the part of the city, without contradiction, that the street was out of repair, and that the defendant, having neglected, after due notice, to put it in repair, as required by its covenant, the city proceeded to make the repairs at a cost, for labor and materials, of \$1,971.72. It employed laborers at the usual wages paid by the city, and purchased materials for the work. It does not affirmatively appear that the labor and

materials employed did not exceed the necessary amount. But the work appears to have been done in the usual manner, and by the agencies usually employed by the city in the prosecution of street repairs. We think the learned counsel for the defendant is correct in the proposition that the measure of damages for the breach of the defendant's covenant was the reasonable cost of the work. The city could not proceed in a reckless or extravagant manner, and charge the defendant for expenses unnecessarily or unreasonably incurred. *State v. Ingram*, 5 Ired. 441; *Rutland v. Dayton*, 60 Ill. 58. But where a covenantee has made repairs which the covenantor was bound, but has neglected, to make, and has proceeded in the usual way, and no fraud is shown, nor any facts to impeach the reasonableness of the account, the sum actually expended in the work is, we think, *prima facie* the sum which he is entitled to recover. In the absence of proof, neither fraud, recklessness, nor extravagance will be presumed, and this measure of recovery presumptively gives the covenantor actual indemnity only.

But it is insisted that the facts proved on the part of the defendant tended to show that the cost of the repairs exceeded a reasonable sum, and that the question, therefore, should have been submitted to the jury. We think there was no question for the jury upon this point. The defendant proved, by its track-master, that the cost to the company of paying with cobble-stone was, in respect to the item of labor, much less per square yard than the sum paid by the city for laying the pavement in question. But the pavement laid was Belgian pavement, and it was proved on the part of the city, and the proof was uncontradicted, that the laying of Belgian pavement involved much more labor and expense than paving with cobble-stones. There was no evidence showing that the charge for labor in the account of the city was excessive, or that more laborers or materials were provided than were reasonably required. We are of opinion, therefore, that the direction of the verdict for the sum actually expended by the city in making the repairs was not error.

A more serious question is raised by exceptions to the admission in evidence of a time-book kept by one John B. Wilt, and of a written memorandum or account made by him, offered to prove the number of days' work performed, and the quantity of materials used. Wilt was a foreman in the employ of the department of public works, and had general charge of the repairs in question. Under him were two gang foremen, or head pavers, Patrick Madden and Charles Coughlan, each having charge of a separate gang of about 10 men employed on the work. Wilt kept a time-book, in which was entered the name of each man employed. He visited the work twice a day,—in the morning and afternoon,—remaining from a few minutes to a half an hour each time; and he testified that while

there he checked on the time-book the time of each man as reported to him by the gang foreman. He also testified that he marked the men's names as he saw them, and that he knew their faces. The gang foreman did not see the entries made by Wilt, but they testified that they correctly reported to him each day the names of the men who worked, and, if any did not work full time, they reported that fact also. Upon this proof the trial judge admitted the time-book in evidence, against the objection of the defendant.

The trial judge also admitted in evidence, under like objection, a written memorandum or account, in the handwriting of Wilt, of materials used. Wilt testified that the entries in the account were made from daily information presented by the gang foremen on the occasions of his visiting the work, and that he correctly entered the amounts as reported. It does not appear that he had any personal knowledge of the matters to which the entries related. The gang foremen were called as witnesses in support of the account. Neither of them saw the entries, and on the trial neither claimed to have any present recollection of the specific quantities so reported by them. Madden testified that he reported the correct amounts to Wilt, and it is inferable from his evidence that, when the reports were made, he had personal knowledge of the facts reported. Coughlan also testified, in general terms, that he reported the items correctly. But on further examination it appeared that his reports to Wilt, of the stone delivered at the work, were made upon information derived by him from the carmen who drew the stone, and who counted them, and who reported the count to Coughlan, who in turn reported to Wilt. Coughlan saw the carmen dump the stone, but he did not verify the count, but appears to have assumed its correctness. The carmen who delivered the stone were not called as witnesses.

The exception to the admission of the time-book presents a question of considerable practical importance. The ultimate fact sought to be proved on this branch of the case was the number of days' labor performed in making the repairs. The time-book was not admissible as a memorandum of facts known to Wilt and verified by him. His observation of the men at work was casual, and it cannot be inferred that he had personal knowledge of the amount of labor performed. His knowledge from personal observation was manifestly incomplete, and the time-book was made up, mainly at least, from the reports of the gang foremen. The time-book was clearly not admissible upon the testimony either of the gang foremen or of Wilt, separately considered. The gang foremen knew the facts they reported to Wilt to be true, but they did not see the entries made, and could not verify their correctness. Wilt did not make the entries upon his own knowledge of the facts, but from the reports of the gang foremen.

Standing upon his testimony alone, the entries were mere hearsay. But, combining the testimony of Wilt and the gang foremen, there was—First, original evidence that laborers were employed, and that their time was correctly reported, by persons who had personal knowledge of the facts, and that their reports were made in the ordinary course of business, and in accordance with the duty of the persons making them, and in point of time were contemporaneous with the transactions to which the reports related; and, second, evidence by the person who received the reports that he correctly entered them, as reported, in the time-book,—the usual course of his business and duty. It is objected that this evidence, taken together, is incompetent to prove the ultimate fact, and amounts to nothing more than hearsay. If the witnesses are believed, there can be but little moral doubt that the book is a true record of the actual fact. There could be no doubt whatever, except one arising from infirmity of memory, or mistake or fraud. The gang foremen may, by mistake or fraud, have misreported to Wilt, and Wilt may, either intentionally or unintentionally, have made entries not in accordance with the reports of the gang foremen. But the possibility of mistake or fraud on the part of witnesses exists in all cases, and in respect to any kind of oral evidence.

The question arises, must a material ultimate fact be proved by the evidence of a witness who knew the fact, and can recall it, or who, having no personal recollection of the fact at the time of his examination as a witness, testifies that he made, or saw made, an entry of the fact at the time, or recently thereafter, which, on being produced, he can verify as the entry he made or saw, and that he knew the entry to be true when made; or may such ultimate fact be proved by showing, by a witness, that he knew the facts in relation to the matter which is the subject of investigation, and communicated them to another at the time, but had forgotten them, and supplementing this testimony by that of the person receiving the communication to the effect that he entered, at the time, the facts communicated, and by the production of the book or memorandum in which the entries were made?

The admissibility of memoranda of the first class is well settled. They are admitted in connection with and as auxiliary to the oral evidence of the witness; and this, whether the witness, on seeing the entries, recalls the facts, or can only verify those entries as a true record made or seen by him at or soon after the transaction to which it relates. *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Guy v. Mead*, 22 N. Y. 462.

The other branch of the inquiry has not been very distinctly adjudicated in this state, although the admissibility of entries made under circumstances like those in this case was apparently proved in *Payne v.*

Hodge, 71 N. Y. 598. We are of opinion that the admissibility of memoranda may properly be extended so as to embrace the case before us. The case is of an account, kept in the ordinary course of business, of laborers employed in the prosecution of work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who, in time, also in accordance with his duty, entered the time as reported. We think entries so made, with the evidence of the foremen that they made true reports, and of the person who made the entries that he correctly entered them, are admissible. It is substantially by this method of accounts that the transactions of business in numerous cases are authenticated, and business could not be carried on and accounts kept, in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. In a business where many laborers are employed, the accounts must, in most cases, of necessity, be kept by a person not cognizant of the facts, and from reports made by others. The person in charge of the laborers knows the fact, but he may not have the skill, or for other reasons it may be inconvenient that he should keep the account. It may be assumed that a system of accounts based upon substantially the same methods as the accounts in this case, is in accordance with the usages of business. In admitting an account verified as was the account here, there is little danger of mistake, and the admission of such an account as legal evidence is often necessary to prevent a failure of justice.

We are of opinion, however, that it is a proper qualification of the rule admitting such evidence that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation. The case before us is within the qualification suggested.

In *Peck v. Valentine*, 94 N. Y. 569, the memorandum there admitted was not an original memorandum, but a copy of a private memorandum made by an employé of the plaintiff for his own purposes and not in the course of his duty, or in the ordinary course of business. The original memorandum was delivered, by the one who made it, to the plaintiff, who lost it, but testified that the paper produced and received in evidence was a copy. The person who made the original memorandum was unable to verify the copy. The court held that the copy was improperly admitted in evidence. The decision in *Peck v. Valentine* rests upon quite different facts from those in this case.

In respect to the admission of the account of material, we think that part of the account based upon the reports of Madden was admissible on the same grounds upon which we have justified the admission of the time-book. Madden in substance testified that he knew the facts and properly reported them, and Wilt testified that he entered them as reported.

The part of the account of materials, the items of which were furnished by Coughlan, was not strictly admissible. Coughlan does not appear to have had personal knowledge of the quantity of stone delivered on his part of the work, but took the count of the carmen, and his reports to Wilt were based upon the reports of the carmen to him. The carmen were not called, and the evidence of Wilt and Coughlan was mere hearsay. If the attention of the court had been called by the defendant to this part of the account, and objection had been specifically taken to the items entered upon the reports of Coughlan, the objection would, we think, have been valid. But the objection was a general objection to the whole account. It was clearly admissible as to the items reported by Wilt, and we think the general objection and exception is not available to raise the question as to the admissibility of the items entered on the report of Coughlan, independently of the others. The whole amount of materials embraced in the recovery was small, and we think no injustice will be done by affirming the judgment. The judgment is therefore affirmed.

All concur.

SMITH v. RENTZ.

(30 N. E. 54, 131 N. Y. 169.)

Court of Appeals of New York. Feb. 12, 1892.

Appeal from supreme court, general term, First department.

Action by Eugene Smith, executor of Richard Patrick, deceased, against Fredericka Rentz, for moneys paid out and expended by plaintiff's testator at defendant's request. Defendant appeals from a judgment of the general term affirming a judgment for plaintiff entered upon the report of a referee. Reversed.

Leopold Leo, for appellant. H. B. Closson, for respondent.

ANDREWS, J. The action was brought to recover moneys advanced and paid out by the plaintiff's testator for the defendant. The complaint alleges that from 1882 to 1887 the testator was the banker and general business agent for the defendant, and that during said years the defendant from time to time deposited moneys with the testator; and the latter, as requested by the defendant, from her funds in his hands, and when these were insufficient from his own, paid her different sums in cash, and also paid taxes and tradesmen's bills for which she was liable; and that there was a balance due the testator on account of such payment of \$3,744.75, which the plaintiff claimed to recover. The answer contained a general denial and interposed special defenses. On the trial before a referee the plaintiff offered in evidence the ledger kept by the testator containing the items of the alleged account. It was admitted against the objection of the defendant. Evidence was given on the part of the plaintiff independently of the ledger, tending to establish many of the items of the account, but a considerable number of the items for which a recovery was had are supported by the ledger alone. If the ledger was improperly admitted in evidence the judgment must be reversed. It was admitted not only to establish the items, of which there was no other proof, but its admission may have influenced the referee in passing upon the items of the account, of which it was not the sole evidence. The referee admitted the ledger on the ground that the defendant had under the Code examined the plaintiff before trial, and in that proceeding had given notice to the plaintiff to produce the books of the testator, and that upon such notice the plaintiff produced certain books of the decedent, among which was the ledger containing his account with the defendant, which was inspected by the defendant's counsel. The referee held that the ledger was thereby made evidence for the plaintiff. The ledger was not used on the examination, nor were any questions asked founded upon the entries therein. A

similar question was before the second division of this court in *Carradine v. Hotchkiss*, 120 N. Y. 608, 24 N. E. 1020. There the plaintiff, on the request of the defendant's counsel, made on the trial, produced a letter, and delivered it to the latter, who read it, but did not offer it in evidence. Thereupon, on demand of the plaintiff's counsel, the court directed the defendant's counsel to put it in evidence, and in obedience to such direction, to which the defendant's counsel excepted, the letter was read to the jury. When the case came to this court on appeal by the defendant this ruling was challenged as erroneous. The court so decided, Haight, J., saying: "Whatever may have been the ancient rule in England upon the subject, we do not understand that the ruling of the court can be sustained under any rule now existing in England or in this state." But the court, being of opinion that the letter did not prejudice the defendant, affirmed the judgment. It is claimed that the decision upon the point of the admissibility of the letter was unnecessary, and therefore is not binding. The question was properly raised, and was decided. Its decision naturally preceded the decision of the subsequent question, and the declaration of the court was not obiter. We think, moreover, that the decision in the case accords with the view which has prevailed in the courts of this state and the practice of the profession. In *Lawrence v. Van Horne*, 1 Caines, 276, the defendant gave notice to the plaintiff to produce on the trial a certain letter, which the plaintiff refused to do unless the defendant would engage to read it in evidence. The defendant claimed the right to inspect the letter before deciding whether he would read it in evidence. The judge ruled that inspection could not be demanded except on the terms which the plaintiff imposed. On appeal one of the judges was of the opinion that the ruling was right, and that the court could not compel a production of a paper for inspection only. But the point was not decided. In *Kenny v. Clarkson*, 1 Johns. 385, Spencer, J., said: "I must not be understood as sanctioning the course adopted at the trial in admitting the paper to be read without proof, because notice had been given to produce it, and it had been called for and perused. The case of *Lawrence v. Van Horne*, 1 Caines, 276, settles nothing, the then chief justice expressing no decided opinion on the question, and the rest of the court were equally divided. It appears to me that the notice to produce a paper, and calling for its inspection, ought to be considered as analogous to a bill for discovery, where most certainly the answer is not evidence but for the adverse party. I think it is our duty to adopt such a course as will not needlessly drive parties into equity for discovery."

The doctrine announced by Judge Spencer

has, so far as our Reports show, been acquiesced in by the courts and the bar of the state without question until a recent period. The English rule has not been uniform. Lord Kenyon, in *Sayer v. Kitchen*, 1 Esp. 209, held that production of a paper on notice did not make it evidence. The rule seems to have been held otherwise by Lord Denman in *Calvert v. Flower*, 7 Car. & P. 386, and in two or three other nisi prius cases, but without any special examination. The courts of Pennsylvania and New Hampshire held the view that production and inspection alone do not make the paper evidence. *Withers v. Gillespy*, 7 Serg. & R. 10; *Austin v. Thomson*, 45 N. H. 113. Gibson, J., in *Withers v. Gillespy*, referring to the practice on bills of discovery, says: "The reasons drawn from analogy render the argument almost insuperable." The New Hampshire case was decided upon an elaborate examination of the English and American authorities, and contains the most thorough opinion on the question to be found in the books. The courts of Massachusetts, Maine, and Delaware seem to have followed the supposed English rule on the subject. It was said in the earliest case in Massachusetts on the subject (*Com. v. Davidson*, 1 Cush. 33) that it was a mooted point whether calling for the books of the opposite party and inspecting them, and doing nothing more, makes the books evidence; but in *Clark v. Fletcher*, 1 Allen, 53, the point was decided. In Maine (*Blake v. Russ*, 33 Me. 360) the question was decided without assigning any reasons; and the ruling in the Delaware case (*Randel v. Chesapeake Co.*, 1 Har. [Del.] 284) was made on the trial, and, so far as appears, without any examination. The authorities on the question are divided. But we perceive no reason for departing from the rule as understood in this state. The claim that it gives the party calling for a paper an unfair advantage, if he may inspect it, and then decline to put it in evidence, seems to us rather specious than sound. The same objection would lie in case of bills for discovery; but it was the settled rule that an answer, though under oath, was evidence only for the party who obtained it. The party who has in his possession books or papers which may be material to the case of his opponent has no moral right to conceal them from his adversary. If, on inspection, the party calling for them finds nothing to his advantage, his omission to put them in evidence does not prevent the party producing them from proving and introducing them in evidence if they are competent against the other party. The party calling for books and papers would be subjected to great hazard if an inspection merely, without more, would make them evidence in the case. That rule tends rather to the suppression than the ascertainment of truth,

and the opposite rule is, as it seems to us, better calculated to promote the ends of justice. The production of books and papers on notice is the voluntary act of the party. If he refuses, it may, as is claimed, authorize the other party to give secondary evidence of their contents, which the party having possession cannot then answer by producing them. But if they contain facts favorable to the other side, they ought to be disclosed; and if production is refused, the party refusing may justly incur the danger of having secondary proof given of their contents. The claim is also made that the books were competent as original evidence of the entries under the rule making books of account in certain cases evidence in favor of the party keeping them. We think there is no foundation for this contention. The rule which prevails in this state (adopted, it is said, from the law of Holland), that the books of a tradesman or other person engaged in business containing items of account, kept in the ordinary course of book-accounts, are admissible in favor of the person keeping them, against the party against whom the charges are made, after certain preliminary facts are shown, has no application to the case of books or entries relating to cash items or dealings between the parties. This qualification of the rule was recognized in the earliest decisions in this state, and has been maintained by the courts with general uniformity. *Vosburgh v. Thayer*, 12 Johns. 461. It stands upon clear reason. The rule admitting account-books of a party in his own favor, in any case, was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity, and was intended for cases of small traders who kept no clerks, and was confined to transactions in the ordinary course of buying and selling or the rendition of services. In these cases some protection against fraudulent entries is afforded in the publicity which to a greater or less extent attends the manual transfer of tangible articles of property or the rendition of services, and the knowledge which third persons may have of the transactions to which the entries relate. But the same necessity does not exist in respect to cash transactions. They are usually evidenced by notes or writing or vouchers in the hands of the party paying or advancing the money. Moreover, entries of cash transactions could be fabricated with much greater safety, and with less chance of the fraud being discovered, than entries of goods sold and delivered or of services rendered. It would be unwise to extend the operation of the rule admitting a party's books in evidence beyond its present limits, as would be the case, we think, if books containing cash dealings were held to be competent. Parties are now competent witnesses in their own behalf. A resort to books of account is thereby ren-

dered unnecessary in the majority of cases. We think the ledger was erroneously admitted in evidence, and the judgment below	should therefore be reversed, and a new trial ordered. All concur, except MAYNARD, J., taking no part.
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CORMAC v. WESTERN WHITE BRONZE CO.

(41 N. W. 480, 77 Iowa, 32.)

Supreme Court of Iowa. Jan. 25, 1889.

Appeal from district court, Polk county; JOSIAH GIVEN, Judge.

Action to recover an amount alleged to be due to plaintiff on account of salary earned as secretary and manager of defendant. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Parsons & Perry, for appellant. *James M. & George E. McCaughan*, for appellee.

ROBINSON, J. Plaintiff was the secretary and manager of defendant during the years 1885 and 1886, and for the month of January, 1887, and claims a balance due on account of salary of \$755.62. Defendant denies the alleged indebtedness, and seeks to recover of ~~defendant~~ \$890.29, on counter-claims for money of defendant alleged to have been collected by plaintiff and converted to his own use, and for unpaid assessments on capital stock of defendant alleged to be owned by plaintiff. The jury found that defendant owed to plaintiff the sum of \$379.20.

1. Plaintiff introduced in evidence certain books of account, which belonged to and had been kept for the defendant. Some of them were objected to on the ground that they had been kept by plaintiff while he was acting as secretary of defendant, and on the further ground that they were not shown to be books of original entries. We are of the opinion that the books were properly retained in evidence. After they were introduced it was admitted that they were defendant's books of original entries; that they were kept in the ordinary manner, and in the regular course of business; and that the entries therein were made at the time of the transactions which they represented. This made them competent evidence as against defendant. The fact that some of the entries were made by plaintiff was immaterial, under the issues of the case. He made them, not for himself, but for the defendant, and as its agent; and the books when completed, were the books of defendant, admissible in evidence against it.

2. One Eakin procured of defendant a certificate for shares representing \$3,000 of its capital stock. He agreed with plaintiff to sell and transfer this to him when he should pay the amount required therefor. A note for \$750 was given to Eakin by plaintiff on account of this stock, and the certificate was placed in the hands of one Fuller, to be delivered to plaintiff when he should pay the note. The note was not paid, and the stock was not transferred. On the books of the company it stood in the name of Eakin. While the plaintiff had an interest in this stock, he never owned it, and never agreed with defendant to pay for it. He was not, therefore, liable to defendant for unpaid assessments made on account of it. See Code, §

1078; *Lumber Co. v. Bank*, 71 Iowa, 270, 32 N. W. Rep. 336; *Hale v. Walker*, 31 Iowa, 344; *Pullman v. Upton*, 96 U. S. 328, and cases therein cited; *Cook, Stocks*, § 246. Defendant's stock subscription book shows that plaintiff subscribed for 50 shares of stock, but he testifies that the number was changed from 20 to 50 without his knowledge or authority, and that he never became a stockholder. He voted at meetings of the stockholders on the stock of Eakin, but did so by virtue of a proxy. His note to Eakin was taken by defendant, but not on account of any transaction between it and plaintiff. It may be that plaintiff had intended to take stock in his own name when he subscribed for it, and that he procured Eakin to take the stock in question in fulfillment of his subscription, but that would not make any privity between him and defendant on the stock which was actually taken by Eakin. The court ruled correctly in withdrawing from the jury all consideration of assessments on the Eakin stock. Complaint is made in this connection of a remark of the court made in announcing its opinion on the question of plaintiff's liability on the Eakin stock, after argument of counsel on that question. The remark was not designed as an instruction to the jury, and could not have been so understood. It was not addressed to them, and was not of a nature to have been considered while they were deliberating upon their verdict, unless they disregarded the charge of the court, and we cannot presume that they did.

3. The court refused to submit to the jury five special interrogatories asked by defendant. The first was as follows: "(1) Did the books of account kept by the plaintiff, while in the management of defendant's business as its agent, show that he received, on account of defendant, more money than he paid out, and, if so, what sum?" This was not relevant to any issue in the case, and was properly refused. The second interrogatory was as follows: "(2) Did he receive, during the time that he had the management of defendant's business, any sums of money which do not appear upon the books kept by him, and for which he has not accounted to the defendant, and, if so, what sum?" We are not prepared to say that this might not have been properly submitted, and yet it does not appear to us that prejudice could have resulted from the refusal to submit it. No answer which could have been given would have controlled the general verdict, in the absence of other special findings. *Dreher v. Railway Co.*, 59 Iowa, 601, 13 N. W. Rep. 754. The third special interrogatory sought to have the jury state whether plaintiff was a subscriber to the capital stock of defendant, and if he was to state the amount of calls for payment, if any, made thereon and unpaid. This was not made material by any issue or evidence in the case. Defendant does not seek to recover on a subscription for stock, but on stock a certificate for which was issued to

Eakin. No call was ever made on plaintiff's subscription. The fourth special interrogatory asked inquired in regard to a settlement of accounts between plaintiff and the board of directors of defendant, and was properly refused, for the reason that there was no evidence of such a settlement. The fifth special interrogatory was to be answered only in the event that the jury answered the fourth, and was therefore properly refused.

4. Counsel for appellant base some argument upon the weight and effect of the evi-

dence. We do not deem it necessary to review this at length, nor to notice more particularly other questions raised. The abstract does not purport to set out all the evidence given on the trial, and some of the questions discussed have no foundation in the record as presented to us. It is sufficient to say that we have examined all questions presented by the record with care, but do not find any error prejudicial to defendant. The judgment of the district court is therefore affirmed.

PRATT v. WHITE.

(132 Mass. 477.)

Supreme Judicial Court of Massachusetts.
Norfolk. March 2, 1882.

C. Q. Tirrell & N. H. Pratt, for plaintiff.
J. Humphrey, for defendant.

DEVENS, J. The admission of the books of account of a party to prove items of work done and goods delivered, when supported by his own oath, or, if he is deceased, that of his administrator or executor, has long been permitted in this state; and under various restrictions, some created by statute, in all the states of the Union. It has been sanctioned as an exception to the general rule of law as it formerly existed that a party should not be a witness in his own case, and from supposed necessity, in order to prevent a failure of justice, that he shall be allowed to produce the record of his daily transactions, to many of which, on account of their variety and minuteness, it cannot be expected there will be witnesses.

It is for the court to decide upon the admissibility of the book offered, although the weight to be given to it afterwards must be largely a question for the jury, in connection with its appearance, the manner in which it is kept, and the other evidence in the case. It must appear to have been honestly kept, and not intentionally erased or altered, and to have been the record of the daily business of the party, made for the purpose of establishing a charge against another. Necessarily, regard is to be had to the education of the party, his methods and knowledge of business, etc., in deciding this question. *Cogswell v. Dolliver*, 2 Mass. 217; *Prince v. Smith*, 4 Mass. 454.

The decision of the court to admit the book is final and conclusive, unless from its character, or from that which was sought to be

proved by it, it could not have been admitted even if it met those tests. Although somewhat irregularly made a part of the exceptions to be examined by the court, the book has not been produced by the defendant for our inspection. It appears that measure, weight, and quantity were not given in connection with the items of goods charged, but for this reason we are not prepared to say that it was inadmissible. If the book contain the record of the party, daily transactions made for the purpose of a charge, it may be admitted, even if deficient in many respects. It does not follow that, before a plaintiff can fairly ask a verdict, he may not be compelled to supply deficiencies in the evidence his book affords. This bill of exceptions does not show that other evidence was not introduced.

A time book which has only the name of the party and marks under particular dates has been admitted. *Mathes v. Robinson*, 8 Metc. (Mass.) 269. Upon the same principle, marks on a shingle or upon a notched stick have been admitted. *Kendall v. Field*, 14 Me. 30; 1 Greenl. Ev. §§ 118, 119. Yet, without additional evidence, these would afford but incomplete proof of a claim. In *Hooper v. Taylor*, 39 Me. 224, a book similar to the one here in question in omitting the weight and quantity of articles was admitted with but little discussion.

There would seem to be no reason why a delivery of specific articles might not be shown by a book of accounts, even if more evidence were needed to show the amount which the plaintiff was entitled to recover. It is easy to imagine many facts in connection with which such charges might be very important. We have no reason to suppose more weight was given to them than that to which they were fairly entitled, and we must presume that the book was submitted to the jury under all proper instructions.

Exceptions overruled.

✓ ELLIS v. HARRIS.

(11 S. E. 248, 106 N. C. 395.)

Supreme Court of North Carolina. March 31, 1890.

Appeal from superior court, Franklin county; CONNOR, Judge.

F. S. Spruill and Batchelor & Devereux, for plaintiff. C. M. Cooke, for defendant.

AVERY, J. The plaintiff claimed through a deed from Bennett Gay, administrator of James Burgess, to William Crowder, dated January 17, 1859, and immediately under a deed dated June 5, 1869, from E. A. Gupton, sheriff of Franklin county, to the plaintiff, reciting a sale by virtue of executions against Willie Crowder. The defendant insisted that plaintiff's deed did not cover the land in controversy, and, as evidence of title in himself, offered the record of a special proceeding and a deed from W. H. Spencer, administrator of J. B. Mann, reciting a sale to make assets in accordance with a decree in said special proceeding, and also introduced evidence tending to show that the calls of said deed included the land in dispute. The plaintiff testified that he was present at the sale of the land of Willie Crowder by the sheriff in the year 1869, and bought the land of said Crowder, including the reversionary interest in the portion occupied as dower by the widow of James Burgess, who remained in possession of that portion of the land till her death, in the year 1884, when he took and retained possession of it till the defendant entered by force, and expelled him, in the year 1884. On the cross-examination of the plaintiff, the defendant's counsel were permitted to ask him how many acres of land were conveyed by the deed of the sheriff, and he answered: "828." He then stated, in response to a question, (plaintiff objecting,) that he gave in for taxation 1,100 acres of land after his purchase at sheriff's sale, and before he sold 172 acres off his tract. The plaintiff excepted. At a subsequent stage of the trial, plaintiff was recalled, and explained that he listed the dower land for taxation, first, in 1885, the widow having paid tax on it previously, and that he had listed for taxation, in 1871, 922 acres, including 90 acres bought from Spencer, administrator.

It is true that in *Thornburgh v. Mastin*, 93 N. C. 258, the court said: "Any one supposing he has a claim upon the land of another may list it, and pay the taxes; but that would be very slight, if any, evidence tending to establish his title." In the case of *Ruffin v. Overby*, 88 N. C. 369, it had been previously held that paying tax on land without actual possession would not perfect a colorable title. But in the case of *Austin v. King*, 97 N. C. 341, 2 S. E. Rep. 678, Justice DAVIS, delivering the opinion of the court, settles the question by laying down the rule that the payment of taxes by a party *ante litem motam* is his act as distinguished from his declaration in reference to the land, and is some evidence to be weighed by the jury in passing upon the issue involving title. This principle

disposes of the first, third, seventh, and ninth exceptions.

The plaintiff then offered in evidence a deed from N. Patterson to James Burgess, executed in 1845, and a deed from Alfred Burgess to James Burgess, executed in the year 1846, in which the lands conveyed are described by metes and bounds, and as 419 acres on Tar river. The plaintiff also introduced the record of the petition of the widow of James Burgess for dower, showing a decree making an allotment to her by metes and bounds. W. N. Fuller then testified, on behalf of the plaintiff, that he surveyed the Burgess tract of land, and very nearly located it by the deeds, and that he also had the survey made when the dower was allotted. The plaintiff then "proved, asset forth in the statement, that James Burgess owned this land, and resided on it, from 1845 until his death, and owned no other land in Franklin county, and that Willie Crowder died in 1870-71, and was plaintiff's brother-in-law." This statement comprehends all of the material evidence for plaintiff; and, as instruction was asked predicated upon all of the testimony, it is necessary to know what it was. The land conveyed in the sheriff's deed to plaintiff (executed 1869) was described therein as "eight hundred and twenty-seven acres of land adjoining the lands of J. B. Mann, deceased, Mrs. Jane Wilder, Gaston Wilder, and others, containing, by estimation, eight hundred and twenty-seven acres, more or less." The descriptive clause in the administrator's deed to Crowder, in 1859, is as follows, viz.: "All that tract or parcel of land belonging to the estate of James Burgess, deceased, lying on Tar river, adjoining lands of the said Willie Crowder, Dr. Joseph B. Mann, and others, and supposed to contain four hundred and nineteen acres, except the life-estate of Lucy Ann Burgess, the widow of James Burgess, in that portion of said land assigned to her as dower, the meaning and intent of this deed being to convey to the said Willie Crowder, absolutely, the whole of the said land not covered by the widow's dower, to vest in possession immediately, and to convey that portion covered by the widow's dower to vest in possession at the death of said widow." The sheriff, Gupton, testified that he levied on and sold Crowder's land under a description given by him in 1869, and also referred to the tax-list for description; that he sold all of the interest of Crowder in the land described in the deed, but said nothing at the time about dower. Calvin Benton testified for the defendant that the dower tract did not adjoin the lands of Mrs. Jane Wilder or Gaston Wilder, nor did it join the Mann land till Mann bought the Burgess land.

The defendant offered to prove the declarations of Crowder while in possession of the land conveyed to him by Gay, administrator of Burgess, characterizing his possession, but stated that he did not know whether it was before or after the sale by the sheriff; that it was after Mann's death, in 1865, (he thought it was in 1870 or 1871,) but that at the time Ellis, the plaintiff, was not living on the land, but was living somewhere else. The court

then admitted the declaration, and the plaintiff excepted. The witness testified as follows: "Crowder showed me a pine near a hog-pen. I saw the chopped line. He said it ran from a hedge-row in a straight line to the river. The land was worth five or six dollars per acre. I heard plaintiff, Ellis, say that he owned all of the interest Willie Crowder had in the land that he (Crowder) owned. I have lived in that neighborhood forty-five years. I knew Dr. Mann. I helped to lay off the dower. Mann had possession of all the Burgess land, except the dower, from the time of the sale by Gay, the administrator. Dr. Perry had possession of part after Mann's death." On cross-examination the witness said: "Dr. Mann was not in possession of the widow's dower. I do not mean that Dr. Mann was in possession of all of it. The large part was in possession of Crowder." It is evident, therefore, that his honor found that the declarations were made by Crowder while he was in possession, before the sale by the sheriff, and when it was against his interest to admit that he held less land than the plaintiff now claims under a deed for all of his interest. So that, if it be conceded that, by locating the line, as marked, from the hedge-row to the river, and adopting the pine as a corner, it would have been against his (Crowder's) interest to surrender all outside of that line, the testimony was not incompetent. *Headen v. Womack*, 88 N. C. 468; *Jones v. Henry*, 84 N. C. 320; *Clifton v. Fort*, 98 N. C. 173, 3 S. E. Rep. 726; *Magee v. Blankenship*, 95 N. C. 563.

Badger Stallings, a witness for the defendant, testified as follows: "I know Willie Crowder, and knew when the land in controversy was sold. Before the sale, I saw Dr. Mann, Willie Crowder, and Joe Bridgers, the surveyor, running the line between Crowder and Dr. Mann. Crowder then told me he had a straight line to the road. The line ran through the dower." The foregoing testimony was also excepted to. The declaration was clearly one made by Crowder in explanation of the character and extent of his possession, and, being against his interest, was unquestionably competent.

The witness was permitted to testify further, plaintiff objecting, as follows: "I heard John Ellis say that he did not claim any of the dower, except the nine acres, until he and Dr. Harris got to arguing about it, when he found by his papers that he had a good title to the whole of it." When the plaintiff, Ellis, was cross-examined, he said: "When Widow Burgess died, I made claim to the land." The defendant was then permitted, his counsel objecting, to ask him as to his declarations; and in response to the question he said: "I did not say that I had no interest in the dower except the 10 acres. I did not say so to Mr. Robert Moore, nor to any one." The testimony objected to on both occasions was competent to contradict Ellis, and to show that in fact he did not claim the whole of the dower land.

The exception growing out of the testimony of the witness Wilder is governed by the same principle to which we have

adverted in discussing the exception to the evidence of Calvin Benton and of Badger Stallings, and the authorities already cited sustain the judge in overruling the plaintiff's objection.

It was not error in the court to refuse to instruct the jury that the plaintiff was entitled to recover upon the whole of the testimony, or any of the different phases of it, suggested by the instructions asked by the plaintiff, which were as follows: "The deeds shown in evidence show that Willie Crowder was the owner of the Burgess tract of land, including the reversion in the dower after the widow's death, and there is no evidence that any other person had any legal title to any part of said tract of land. [This instruction was not given, and the plaintiff excepted.] The jury cannot consider the declarations of Crowder or Ellis as affecting the title of either Crowder or Ellis to said land, and there is no evidence which can be considered by the jury to show that the said Crowder, up to the sheriff's sale, and Ellis after the sheriff's sale, did not have the title to said land, including the part in controversy in this action. [This instruction was not given, and the plaintiff excepted.] There is no evidence that Dr. Mann ever had any title to any part of the land in controversy, and the deed to the defendant conveys no title to any part of the land in controversy. [This instruction was not given, and the plaintiff excepted.] If the jury believe the testimony of the witnesses, they will find the first issue in favor of the plaintiff. [This instruction was not given, and the plaintiff excepted.] If the jury believe the evidence of the plaintiff, Ellis, and the witness Gupton, they will find the first issue in favor of the plaintiff. [This instruction was not given, and the plaintiff excepted.] The deeds set forth the boundaries of land, but it is the testimony that locates them. In this case, the conflict arising out of contradictory evidence as to the extent of the plaintiff's land, whether it included the whole of the dower, or the lines should be so run as to exclude 10 acres, covering the land on which the alleged trespass was committed, could be settled only by the jury. If the declarations of Crowder and Ellis were competent, as we have held they were, then the jury could consider the testimony as to what they, or either of them, said in reference to the location of the line, for what they deemed it worth, as tending to show whether the land in controversy was sold by the sheriff, and was covered by plaintiff's deed from him. The plaintiff could not recover only on the strength of his own title, and, if the land was not embraced within the boundaries of his deed from the sheriff, he could not recover; and in that event it was immaterial whether the administrator's deed included the disputed territory or not. It would have been error in the court to predicate its instruction upon the supposed truth of the testimony of one or more witnesses of the plaintiff, as asked, when the testimony of Benton, Stallings, Wilder, and the defendant tended to contradict it, and when there was some conflict between the evidence of the plaintiff and Gupton, the witnesses mentioned.

We see no error in the charge of the court of which the plaintiff can justly complain. A review of the charge will show that it was even more favorable to the plaintiff than was requisite in restricting the jury to the purposes for which they could consider certain testimony mentioned. The court charged the jury as follows: "The plaintiff contends that the deed made by the sheriff in 1869 conveys the land in controversy, being that part of the Burgess land known as the dower. The defendant denies this averment, and says that the description in the deed does not cover or include the dower. Your verdict will depend upon the view which, upon the whole testimony, you may take of this question. As a matter of law, I charge you that all of the interest which Willie Crowder had in the land described in the deed passed to the plaintiff. It is for you to say what land was sold, and is described in the sheriff's deed. [Plaintiff excepted to this part of the charge.] The evidence of the declarations of Willie Crowder in regard to the settlement of a lien, etc., is not admitted for the purpose of showing title, and you should not consider it for that purpose; but it is proper for your consideration as bearing upon the question as to what land the sheriff sold. The sheriff swears that he obtained a description of the land for the purpose of making a levy from Willie Crowder; that he also consulted the tax-books. The testimony of the witnesses in regard to the possession of the land is admitted for the same purpose. The testimony in regard to the declarations of Ellis after the death of the widow is admitted for the same purpose; so the tax-lists, etc. [To this part

of the charge plaintiff excepted.] The testimony of the acts, conduct, and declarations of Willie Crowder and John Ellis are not admitted for the purpose of affecting the title of Crowder, but to aid you in determining what land was levied upon and sold by the sheriff. In this same connection, you may consider the testimony in regard to the description given by Crowder to Gupton, sheriff, for the purpose of enabling him to make levy. [This part of the charge was excepted to by the plaintiff.] When the boundaries of a tract of land are established and known, the quantity or number of acres called for by the deed is immaterial, and could not affect the boundaries; but when the boundaries are unknown, not established, and the jury are charged with the duty of locating the land, the number of acres called for may be considered by them, in connection with other testimony, in ascertaining what land is in fact covered by the deed. [The plaintiff excepted to this part of the charge.]"

Counsel, in the argument, contended that the plaintiff was entitled to recover because this was an action for possession only, and the plaintiff had testified that defendant expelled him from the land by force in the year 1884. Upon referring to the record, we find that the pleadings distinctly raise the question of title, and that the court submitted issues involving the ownership, wrongful possession, and damage, without objection. It is needless to add that the testimony tended on the one hand to establish, and on the other to disprove, that the title to the land in controversy was in plaintiff. There is no error.

Judgment affirmed.

PICKENS v. DAVIS.

(134 Mass. 252.)

Supreme Judicial Court of Massachusetts.
Plymouth. Feb. 3, 1883.

Appeal from Probate Court, Plymouth county; Morton, Judge.

E. Robinson, for appellant. H. Kingman, for appellee.

C. ALLEN, J. The two questions in this case are: First, whether the cancellation of a will, which was duly executed, and which contained a clause expressly revoking former wills, has the effect, as matter of law, to revive a former will which has not been destroyed, or whether in each instance it is to be regarded as a question of intention, to be collected from all the circumstances of the case; and, secondly, if it is to be regarded as a question of intention, whether subsequent oral declarations of the testator are admissible in evidence for the purpose of showing what his intention was. These are open questions in this commonwealth. In *Reid v. Borland*, 14 Mass. 208, the second will was invalid, for want of due attestation. In *Laughton v. Atkins*, 1 Pick. 535, the second will was adjudged to be null and void, as having been procured through undue influence and fraud; and the whole decision went upon the ground that it was never valid, and could not be.

The first of these questions has been much discussed, both in England and America; and it has often been said that the courts of common law and the ecclesiastical courts in England are at variance upon it. See 1 Williams, Ex'rs (5th Am. Ed.) 154-156, where the authorities are cited. The doctrine of the ecclesiastical courts was thus stated in 1824 in *Usticke v. Bawden*, 2 Add. Ecc. 116, 125: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncanceled, upon the cancellation of a later, revocatory, will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision either way, solely according to facts and circumstances." See, also, *Moore v. Moore*, 1 Phillim. 406; *Wilson v. Wilson*, 3 Phillim. 543, 554; *Hooton v. Head*, Id. 26; *Kirkcudbright v. Kirkcudbright*, 1 Hagg. Ecc. 325; *Welch v. Phillips*, 1 Moore, P. C. 299. In *Pow. Dev.* (Ed. 1827) 527, 528, a distinction is taken between the effect of the cancellation of a second will which contains no express clause revoking former wills, and of a will which contains such a clause; and in respect to the latter it is said that: "If a prior will be made, and then a subsequent one, expressly revoking the former, in such case, although the first will be left entire, and the second will afterwards canceled, yet the better opinion seems to be that the former is not thereby set up again." Jar-

man's note questions the soundness of the above doctrine. Page 529, note. While this apparent discrepancy in the respective courts remained not fully reconciled, in 1837, the English statute of wills was passed (St. 7 Wm. IV. and 1 Vict. c. 26) section 22 of which provided that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the reexecution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." Since the enactment of this statute, the decisions in all the courts have been uniform that, after the execution of a subsequent will which contained an express revocation, or which, by reason of inconsistent provisions, amounted to an implied revocation of a former will, such former will would not be revived by the cancellation or destruction of the later one. *Major v. Williams*, 3 Curt. Ecc. 432; *James v. Cohen*, Id. 770, 782; *Brown v. Brown*, 8 El. & Bl. 876; *Dickinson v. Swatman*, 30 L. J. Prob. & Mat. & Adm. 84; *Wood v. Wood*, L. R. 1 Prob. & Div. 309. In order to have the effect of revocation, it must, of course, be made to appear that the later will contained a revocatory clause, or provisions which were inconsistent with the former will; and the mere fact of the execution of a subsequent will, without evidence of its contents, has been considered insufficient to amount to a revocation. *Cutto v. Gilbert*, 9 Moore, P. C. 131. See, also, *Nelson v. McGiffert*, 3 Barb. Ch. 158.

In the United States there is a like discrepancy in the decisions in different states, though the clear preponderance appears to be in favor of a doctrine substantially like that established in the ecclesiastical courts. This rule was established in Connecticut in 1821, in *James v. Marvin*, 3 Conn. 576, where it was held that the revocatory clause in the second will proprio vigore operated instantaneously to effect a revocation, and that the destruction of the second will did not set up the former one; and the like rule was declared to exist in New York by the supreme court of that state, in 1857, in *Simmons v. Simmons*, 26 Barb. 68. The question was greatly considered in Maryland, in 1863, in *Colvin v. Warford*, 20 Md. 357, 391, and the court declared that "a clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it." The court further held that the cancellation of a revoking will prima facie is evidence of an intention to revive the previous will, but the presumption may be rebutted by evidence of the attending circumstances and probable motives of the testator. In *Harwell v. Lively*, 30 Ga. 315, in 1860, a similar rule was laid down and main-

tained with great force of reasoning. The opinion of the court concludes with the following pertinent suggestion: "It must be conceded there is much law adverse to the doctrine. * * * Calculated as it is to subserve and enforce the tenor and spirit of our own legislation, and to give to our people the full benefit of the two hundred years' experience of the mother country, as embodied in the late act, is it not the dictate of wisdom to begin in this state where they have ended in England? We think so." See, also, *Barksdale v. Hopkins*, 23 Ga. 332. The courts of Mississippi, in 1836, and of Michigan, in 1881, adopted the same rule. *Bohanon v. Walcot*, 1 How. (Miss.) 336; *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799. It is to be observed that some of the foregoing decisions are put expressly on the ground that the later will contained an express clause of revocation. 45 Mich. 246, 7 N. W. 799; 20 Md. 392. An examination of the cases decided in Pennsylvania leads us to infer that a similar rule would probably have been adopted in that state, if the question had been directly presented. *Lawson v. Morrison*, 2 Dall. 286, 290; *Boudinot v. Bradford*, 2 Yeates, 170; *Id.*, 2 Dall. 266. *Flintham v. Bradford*, 10 Pa. St. 82, 85, 92.

On the other hand, in *Taylor v. Taylor*, 2 Nott. & McC. 482, in 1820, it was held in South Carolina that the earlier will revives upon the cancellation of the later one; and the same rule prevails in New Jersey, as is shown by *Randall v. Beatty*, 31 N. J. Eq. 643, and cases there cited.

In various states of the Union statutes have been enacted substantially to the same effect as the English statute above cited, showing that wherever, so far as our observation has extended, the subject has been dealt with by legislation, it has been thought wiser and better to provide that an earlier will shall not be revived by the cancellation of a later one. There are, or have been, such statutes in New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas, and Virginia, and probably in other states. Concerning these statutes of New York, it is said in 4 Kent, Comm. 532, that they "have essentially changed the law on the subject of these constructive revocations, and rescued it from the hard operation of those technical rules of which we have complained, and placed it on juster and more rational grounds."

On the whole, the question being an open one in this state, a majority of the court has come to the conclusion that the destruction of the second will in the present case would not have the effect to revive the first, in the absence of evidence to show that such was the intention of the testator. The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it

should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators in the majority of instances. The wisdom which has come from experience in England and in this country seems to point the other way. In the absence of any statutory provision to the contrary, we are inclined to the opinion that such intention, if proved to have existed at the time of canceling the second will, would give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence. Under the statute of England, and of Virginia, and perhaps of other states, such revival cannot be proved in this manner. *Major v. Williams*, and *Dickinson v. Swatman*, above cited; *Rudisill v. Rodes*, 29 Grat. 147. But this results from the express provision of the statute.

In the present case there was no evidence tending to show that the testatrix intended to revive the first will, unless the bare fact that the first will had not been destroyed amounted to such evidence. Under the circumstances stated in the report little weight should be given to that fact. The will was not in the custody of the testatrix, and the evidence tended strongly to show that she supposed it to have been destroyed.

The question, therefore, is not very important, in this case, whether the subsequent declarations of the testatrix were admissible in evidence for the purpose of showing that she did not intend by her cancellation of the second will to revive the first, because, in the absence of any affirmative evidence to prove the existence of such intention, the first will could not be admitted to probate. Nevertheless, we have considered the question, and are of opinion that such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive or not to revive the earlier will. Whether it had the one effect or the other depended upon what was in the mind of the testatrix. It would in many instances be more satisfactory to have

some decisive declaration made at the very time, and showing clearly the character of the act. Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant to make of his property. On the other hand, they may have been made under such circumstances as to furnish an entirely satisfactory proof of his real purpose. It is true that it may not be proper to prove the direct act of cancellation, destruction, or revocation in this manner. But when there is other evidence of an act of revocation, and when the question of the revival of an earlier will depends upon the intention of the testator, which is to be gathered from facts and circumstances, his declarations, showing such intention, whether prior, contemporaneous, or subsequent, may be proved in evidence.

In the great case of *Sugden v. St. Leonards*, 1 Prob. Div. 154, the question underwent full discussion, in 1876, whether written and oral declarations made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents; and it was decided in the affirmative. It was admitted in the argument at one stage of the discussion that such subsequent dec-

larations would be admissible to rebut a presumption of revocation of the will; but, this being afterwards questioned, it was declared and held, on the greatest consideration, not only that these, but also that declarations as to the contents of the will, were admissible. See pages 174, 198, 200, 214, 215, 219, 220, 225, 227, 228, 240, 241. The case of *Keen v. Keen*, L. R. 3 Prob. & Div. 105, is to the same effect. See, also, *Gould v. Lakes*, 6 Prob. Div. 1; *Doe v. Allen*, 12 Adol. & E. 451; *Usticke v. Bawden*, 2 Add. Ecc. 123; *Welch v. Phillips*, 1 Moore, P. C. 299; *Whiteley v. King*, 10 Jur. (N. S.) 1079; *In re Johnson's Will*, 40 Conn. 587; *Lawyer v. Smith*, 8 Mich. 411; *Patterson v. Hickey*, 32 Ga. 156; 1 Jarm. Wills (5th Am. Ed. by Bigelow) 130, 133, 134, 142, and notes. The question was also discussed, and many cases were cited, in *Collagan v. Burns*, 57 Me. 440, but the court was equally divided in opinion. Many, though not all, of the cases, which at first sight may appear to hold the contrary, will be found on examination to hold merely that the direct fact of revocation cannot be proved by such declarations.

The result is that, in the opinion of a majority of the court, the will should be disallowed, and the decree of the probate court reversed.

✓ YOUNG v. KANSAS CITY, FT. S. & M. R. CO.

(39 Mo. App. 52.)

Court of Appeals of Missouri. Jan. 21, 1890.

Appeal from circuit court, Howell county; J. F. Hale, Judge.

Wallace Pratt and Olden & Green, for appellant.

ROMBAUER, P. J., delivered the opinion of the court.

This is an action for double damages, under the provisions of section 809 of the Revised Statutes of 1879. There was judgment for plaintiff below, and the defendant, appealing, assigns for error that the statement is jurisdictionally defective, that the court admitted illegal and incompetent evidence, and that the evidence is insufficient to support the judgment.

The statement, the sufficiency of which is thus challenged, is as follows:

"Before W. W. Tucker, J. P., Hutton Valley township, in Howell county, Missouri. George K. Young vs. Kansas City, Ft. Scott & Memphis Railroad Company. Damages. Plaintiff states that the defendant is and was on the seventh day of September, 1888, a corporation organized and existing under the laws of the state of Missouri, and, as such corporation, owned and operated a railroad passing and running through Dry Creek township, in said county and state aforesaid; that on the seventh day of September, 1888, the said defendant, by its agents, servants, and employes, while running a locomotive and train of cars on said road in said Dry Creek township, ran against, struck, and killed a certain mule of plaintiff of the value of one hundred dollars, and one calf of plaintiff of the value of ten dollars, to plaintiff's damage in the sum of one hundred and ten dollars; that said mule and calf came upon the track of said railroad in said township where it passes through unenclosed lands where said railroad company was and is by law required to erect and maintain a good and lawful fence on each side of its railroad, and where there was not any crossing of said railroad by a public or private highway; that the defendant on said seventh day of September, 1888, and for a long time prior thereto, failed and neglected to keep and maintain a lawful fence on the sides of said road, at a point where said mule and calf got upon the track and were killed, and that, by reason thereof, said mule and said calf got upon said railroad track and were killed, and the killing of said mule and said calf was occasioned then and there by the neglect and failure of the defendant to erect and maintain lawful fences on the sides of its said railroad aforesaid. Plaintiff also states that Hutton Valley township is adjoining to said Dry Creek township in said county. Wherefore plain-

tiff, by reason of the killing of said mule and said calf, as aforesaid, and by virtue of section 809 of the Revised Statutes of Missouri of 1879, demands judgment for double the value of said mule and the said calf in the sum of two hundred and twenty dollars."

No particular defect in the statement is pointed out by appellant, and we can see none. It states all necessary jurisdictional facts. It expressly states the obligation of the defendant to fence its track where the accident occurred, and that the animals came upon the track where it was unfenced, and where the defendant was under legal obligation to fence, and that they were killed in consequence. It further states that this happened in an adjoining township to the one where the suit is brought. That the suit is brought in Hutton Valley township appears by the statement, by the justice's transcript, and by the circuit clerk's certificate, which describes the transcript filed in his office as being a transcript from the office of W. W. Tucker, one of the justices of the peace of Hutton Valley township in Howell county. The first assignment of error is, therefore, clearly untenable.

Upon the trial the plaintiff gave oral evidence to the effect that Dry Creek township, where the accident occurred, and Hutton Valley township, where the suit was instituted, were adjoining townships. This evidence was objected to by the defendant, on the ground that such fact was matter of record, which could not be established by oral evidence. The law, as embodied in sections 7426 and 7427 of the Revised Statutes of 1879, requires the county court to divide the county into convenient townships, to cause its clerk to enter the description of the townships of record, and, within thirty days after establishing a township, to transmit to the secretary of state a description of such township and its boundaries. The general rule unquestionably is that oral evidence cannot be substituted for any instrument which the law requires to be in writing, such as records, public documents, etc. (1 Greenl. Ev. § 86); but we do not understand the rule as excluding evidence of reputation, where the fact sought to be established is a boundary not of particular but of general public interest. Upon principle the same rule should, and unquestionably does, apply to such boundaries, as applies at common law to ancient boundaries of parishes, manors, and the like, which are of public interest, and touching which oral proof was always admissible. 1 Greenl. Ev. § 145. The boundaries of a township are of public interest to all its inhabitants, as, under our laws, questions of taxation for local purposes are determined by such boundaries. We must, therefore, conclude that the second assignment of error is likewise untenable.

The last assignment is likewise untenable. The evidence was sufficient to justify the jury to infer that the animals came upon the track, and were killed, at a point where the railroad company was under legal obligations to fence. *Vaughan v. Railroad*, 34 Mo. App. 141. The fact that the plaintiff was not shown to be an adjoining owner was immaterial, since there was no pretense that

the animals came upon the track from adjoining fields which were fenced, as was the case in *Ferris v. Railroad*, 30 Mo. App. 122, and cases there cited, but it was shown that the railroad, at the place where the animals came upon the track and were killed, ran through open and unenclosed lands.

All the judges concurring, the judgment is affirmed.

SITLER et al. v. GEHR.

(105 Pa. St. 577.)

Supreme Court of Pennsylvania. March 7, 1884.

Error to court of common pleas, Berks county.

A. G. & H. D. Green (Wharton Morris and Wm. H. Livingood, with them), for plaintiffs in error. Isaac Hiester (Humes & Frey and John F. Smith, with him), for defendant in error.

PAXSON, J. The first five assignments of error may be considered together. They raise the question of the admissibility of the declarations of Anna Maria Gehr and John Gehr upon a question of pedigree. The purpose of offering said declarations was to establish relationship between the plaintiff, and Balser Geehr, of Berks county. The evidence was objected to because it was not shown aliunde that the declarants were of the family of the Berks county Balser Geehr. The evidence was admitted and bill sealed for the defendants.

The rules of evidence applicable to pedigree cases are: (1) That the statements must be made ante litem motam. (2) Declarant must be dead. And (3) But a prior condition to both these is that it should be proved by some source of evidence, independent of the statement itself, that the person making the statement is related to the family about which he speaks. *Smith v. Tebbitt*, L. R. 1 Prob. & Div. 354.

It was not denied that the first two conditions had been fulfilled. Neither was it questioned that the declarants were shown by evidence dehors the declaration to be related to the family of Joseph Gehr, the ancestor of the plaintiff, but it was contended that the declarants must be shown by evidence aliunde to be related to Balser Geehr, of Berks county; in other words, to the person last seised of the estate, or his particular branch of the family. To state the question in another form: The declarants were Anna Maria Gehr and John Gehr. The plaintiffs' ancestor was Joseph Gehr. The deceased ancestor was Balser Geehr, of Berks county. It was not denied that the declarants were of the family of Joseph Gehr, and it was attempted to show by their declarations that the above-named Joseph Gehr and Balser Geehr were related to each. The question was whether sufficient ground had been laid for such declarations.

The plaintiffs in error contend, not only that the declarants must be shown by evidence aliunde to be related to the family as to which the declarations were made, but also that they must also be thus shown to be related to the person who died seised. The first part of this proposition is undoubtedly true under all the authorities. The latter portion of it is not so clear. I have carefully examined all the authorities cited on

both sides upon this point, and many others to which our attention was not called upon the argument; and, although there is some conflict in the cases, the weight of authority seems to be that, while a declarant must be shown by evidence aliunde to belong to the family, it does not appear to be necessary to show that he belongs to the same branch of it. In *Vowles v. Young*, 13 Ves. 147, it was held that the declarations of a deceased husband concerning the descent or pedigree of his wife are admissible. And in *Jewell v. Jewell*, 1 How. 219, that the declarations of a deceased husband and of one of the plaintiffs, claiming as heir of her father, that his wife was not married to her father, were admitted.

It would seem, however, that the declarations of a husband in regard to his wife's family, or of a wife in regard to her husband's, rest upon substantially the same principles as those of a relation by blood, and these cases do not throw much light upon the question we are considering.

Doe d. Jenkins v. Davies, 59 E. C. L., 314, cited by plaintiff in error, was an action of ejectment, and the vital question in the case was, whether Elizabeth Jenkins was legitimate. If she was, it was admitted the verdict must be for defendant. After the plaintiff had offered evidence to show that E. J. was not legitimate, an attorney produced a certificate of the marriage of Eleanor Diller to John Davies, the father of E. J., and stated that he had received it from E. J. when he was inquiring into the pedigree. He was then asked whether E. J. made any statement regarding her mother's marriage. The question was objected to upon various grounds: "(1) That she was not yet conclusively proved to be a member of the family; and (2) that the question whether E. J. was a member of the family was in fact the issue for the jury, and, if she was decided to be legitimate, her declarations to prove her legitimacy were superfluous." It was held by Lord Denman, in regard to the first objection, that it was the duty of the judge to decide whether it was proved to him, and he decided that it was; and as to the second objection, he answered it by saying: "Neither the admissibility nor the effect of the evidence is altered by the accident that the fact which is for the judge as a condition precedent is the same fact which is for the jury in the issue." Here the declarant was not shown aliunde to be a member of the family. Her declaration tended to make her so.

Blackburn v. Crawfords, 3 Wall. 185, also cited by plaintiffs in error, does not sustain their contention. In this case the question was whether Dr. Crawford had been married to Elizabeth Taylor. The plaintiffs claimed to be his nieces and nephews. To prove this relationship, they offered the declaration of one Sarah Evans, who was a sister of Elizabeth Taylor. The evidence was held incompetent, because she did not belong

to the family. The question was, who were Dr. Crawford's heirs? It was said by Mr. Justice Swayne, in delivering the opinion of the court: "If it had been proved by independent testimony that Sarah Evans was related by blood to any branch of the family of David Crawford, and her declaration had been offered to prove the relationship of another person claiming or claimed to belong also to that family, this case—*Monkton v. Attorney General*, 2 Russ. & M. 157—would have been in point. But this declaration of Sarah Evans, offered to prove that her sister was connected by marriage with a member of that family, was neither within the principle nor the language of that authority."

Monkton v. Attorney General, referred to by Justice Swayne, will be commented upon later in this opinion.

Attorney General v. Kohler, 9 H. L. Cas. 653, we regard as authority against the position assumed by the plaintiffs. There the issue was the right of succession to the estate of one George Keylor, an officer of artillery, who died intestate. The claims of the respondents depended upon their establishing the identity of the intestate with one George Frederick Koehler, which they offered to do by the declarations of Johann Jacob Koehler, an uncle of George Frederick Koehler. It having been established that the declarant was the uncle of George Frederick Koehler, his declarations were admitted as to the pedigree of George Frederick Koehler and the events of his early life, tracing him into the artillery service, and identifying him with George Keylor, the intestate. It will be noticed in this case that there was no evidence aliunde to show that Johann Jacob Koehler, the declarant, was related to George Keylor, the artilleryman. It was shown, however, that he belonged to a branch of the family.

In *Chapman v. Chapman*, 2 Conn. 347, the witness did not name the person whose declaration he had sworn to, nor did it ever appear that the declarant was dead. It was properly held that the evidence was inadmissible.

In *Davies v. Morgan*, 1 Crompt. & J. 587, it was ruled that declarations of deceased corporators were evidence of a custom to exclude foreigners. But it was not shown that the declarant was a member of the corporation. In *Doe v. Randall*, 2 Moore & P. 20, it was held that declarations of a party connected by marriage are admissible. *Casey v. O'Shaunessy*, 7 Jur. 1140, was an attempt to prove declarations of a Catholic priest as to the legitimacy of the parties. It was not contended that he was related to any of the parties, and his declarations were only to the effect that the parties had always been reputed to be husband and wife in his parish. In *Johnson v. Lawson*, 2 Bing. 86, it was held that declarations of servants and intimate acquaintances are not admissible evidence in questions of pedigree.

Crease v. Barrett, 1 Crompt. M. & R. 919, involved a question of custom, in which it was held that "declarations of a deceased lord of the manor as to the extent of his rights over the wastes of a manor are not admissible; aliter if spoken of the extent of the waste only." In *Jackson v. Browner*, 18 Johns. 37, the witnesses were not connected with the family, and had no personal knowledge of the fact of which they spoke, and did not derive their information from persons connected with the family. *Waldron v. Tuttle*, 4 N. H. 371, merely confines the rule to declarations of deceased persons who had no interest and who were relatives. *Gregory v. Baugh*, 4 Rand. 611, is principally a review of all the laws concerning Indian slavery in the state of Virginia, and it was held that in questions of freedom, evidence that there had been a belief in the neighborhood, more than fifty or sixty years before, that the female ancestor of the plaintiff was entitled to her freedom, was not admissible. *Whitelocke v. Baker*, 13 Ves. 514, was a case of partition, and it was merely ruled that the tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely from their domestic habits and connections that they are speaking the truth, and that they could not be mistaken.

Many of the above authorities were not cited by the plaintiffs in error. Most of them are, however, referred to in the authorities they rely upon, and I have gone over them, at the risk of being tedious, in order to ascertain just what they decide. It will be seen that those of them which bear upon this question at all do not go beyond the admitted principle that, before declarations of deceased persons can be received in questions of pedigree, the declarant must be shown aliunde to be related to some branch of the family as to which the declarations are offered. The whole question is thus summed up by Mr. Wharton in his work on Evidence (page 216): "Declarations as to a family, in order to be received, must emanate from deceased persons connected with such family by blood or marriage." The same rule is laid down in most of the approved text-books. See *Phil. Ev.* § 275; *Taylor, Ev.* 576. The last case to which I shall refer is that of *Monkton v. Attorney General*, 2 Russ. & M. 157, where it was said by Lord Brougham: "I entirely agree that, in order to admit hearsay evidence in pedigree, you must by evidence dehors the declarations connect the person making them with the family. But I cannot go the length of holding that you must prove him to be connected with both the branches of the family, touching which his declaration is tendered. That he is connected with the family is sufficient; and that connection once proved, his declarations are then let in upon questions touching that family; not declarations of details which would not be evidence, but declarations of the na-

ture of pedigree,—that is to say, of who was related to whom, by what links the relationship was made out, whether it was a relationship of consanguinity or of affinity only, when the parties died, or whether they are actually dead; everything, in short, which is, strictly speaking, matter of pedigree,—may be proved as matter relating to the condition of the family, by the declarations of deceased persons, who, by evidence dehors those declarations have been previously connected with the family respecting which their declarations are tendered. To say that you cannot receive in evidence the declarations of A., who is proved to be a relation by blood of B., touching the relationship of B. with C., unless you have first connected him also by evidence dehors his declaration with C., is a proposition which has no warrant either upon the principle upon which hearsay is let in, or in the decided cases; and it plainly involves this absurdity: that if, in order to connect B. with C., I am first to prove that A. is connected with B., and then to superadd the proof that he is connected with C., I do a thing which is vain and superfluous, for then the declaration is used to prove the very fact which I have already established; inasmuch as it is not more true that things which are equal to the same thing are equal to one another, than that persons related by blood to the same individual are more or less related by blood to each other. It is clear, both upon principle and from total want of any contrary authority in adjudged cases, or in the dicta of judges or text writers, that the argument fails entirely, which would limit the rule respecting evidence of that description to a greater extent than by requiring you to connect with the family, by matter dehors the declaration itself, the party whose declaration you receive.”

This case was much relied upon by the defendant in error, and the facts certainly are strikingly similar to those of the case in hand. The decedent, Samuel Troutbeck, died at Madras in 1785. After reciting in his will that he had no relation or kindred alive to his knowledge or belief, having outlived them all, he gave “unto Mr. John Troutbeck, surgeon, late of the ship *Speke*, in the English East India Company’s service, the sum of five gold star pagodas * * * as a person nearly of the same name with Troutbeck, though I solemnly believe and declare that the said John Troutbeck is not in any way related to me, or of the same family or kindred with me, and I disclaim all relationship with him or to him.” The testator then proceeded to dispose of his property by charitable bequests which were void. On the appeal the main question was how far the vice chancellor was right in rejecting from his consideration, as evidence of the relationship between the testator and the claimants, certain documents purporting to be a genealogical narrative and pedigree

of the Troutbeck family. These papers were in the handwriting of John Troutbeck (the surgeon mentioned as legatee in the will), and were found among his papers at the time of his death, which occurred in 1792. The result of the narrative and pedigree was that George, the narrator’s father, and Samuel, the testator, who died at Madras, were descended from the same grandfather, and were therefore first cousins. There was no difficulty in connecting the claimants and the narrator with George of Riding; and the testator was distinctly shown to be the son of Samuel Troutbeck of Wapping. The difficulty lay in connecting George with Samuel, and this was fully made out by the narrative or pedigree referred to, which was held to be admissible for that purpose. It was to these facts that Lord Brougham applied the language I have cited from his opinion, and the case shows very satisfactorily that while a declarant must be connected with the family—that is, with some branch of it—yet, when that connection is proved, the relationship between different members of the family may be shown by his declarations, or, as is stated in the syllabus to that case: “Where in a pedigree case the object is to connect A. with C., after proving that B., a deceased person, was related to A., it is competent to give in evidence declarations by B., in which he claimed relationship with C.”

We now return to the question of the competency of the declarations in this case. We have already seen that the declarants were related to the plaintiff’s ancestor. They were therefore of his family. The plaintiff’s name was Baltzer Gehr, and the question was whether he was related to the Balser Gehr of Berks county. The deposition of the plaintiff, taken after he was one hundred years old, was read upon the trial below, and he testified that he was named after Balser Gehr of Berks county, and that the said Balser Gehr was his uncle, a brother of his father. It is true that his knowledge of this relationship was derived from his mother. He said: “About his being my uncle, my mother told me that, she always called him my uncle; that’s what made me know.” Was this sufficient to justify the learned judge in admitting the declarations?

It is to be observed, in the first place, the evidence was to the court, not to the jury. It is the province of the court to decide whether a sufficient connection had been established to permit the declaration to go to the jury. As was said in *Doe d. Jenkins v. Davies*, supra, in a similar case: “It was the duty of the judge to decide whether it was proved to him. There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus, an oath or its equivalent, and competency, are conditions precedent to admitting *viva voce* evidence; and apprehension of immediate

death to admitting evidence of dying declarations; and search to secondary evidence of lost writings; and so is consanguinity or affinity in the declarant to declarations of deceased relatives. The judge alone has to decide whether the condition has been fulfilled. If proof is by witnesses, he must decide upon their credibility. If counter evidence is offered, he must receive it before he decides, and he has no right to ask the opinion of the jury on the fact as a condition precedent." See *Bartlett v. Smith*, 11 Mees. & W. 483.

The learned judge below was satisfied and received the evidence. We cannot say he was wrong. The plaintiff was a competent witness, made so by law, and his testimony, as to his relationship with Balser Gehr, of Berks county, was properly received. It is true his information was derived from his mother, and was to that extent hearsay. But a large proportion of the knowledge which every intelligent man has is derived from hearsay. Indeed, we scarcely realize how little we actually know from our own observation and investigation. We learn the truths of history, the secrets of science and our knowledge of the world generally, from what we have read, or from what others have told us. What does a man know of his deceased ancestors but what he has learned from his immediate relatives? How was the plaintiff, who had never seen Balser Gehr, of Berks county, to know that the latter was his uncle, except from his mother? It is in just such cases that the strict rules of evidence are relaxed as regards hearsay. If it were otherwise, pedigree could not be proved at all in many cases, and in one sense it is primary, not secondary, evidence. The law upon this point is clearly stated in 1 Whart. Ev. § 201: "Pedigree, from the nature of things, is open to proof by hearsay in respect to all family incidents as to which no living witness can be found. If what has been handed down in families cannot be in this way proved, pedigree could not, in most cases, be proved at all. Nor is such tradition, in its best sense, open to the objections applicable to hearsay. A., called as a witness to pedigree, may indeed say, 'B. told me this.' But pedigree testimony usually takes another shape. It is not, 'B. told this,' but 'Such was the understanding of the family.' The constitution of a family may become a matter of immediate perception. A., B., C., and D., are brought up as brothers in the same household. If any one says to A., 'B. is your brother,' A. would not regard such an announcement as any more disclosing a fact to him than would the announcement to him that he is a human being. That B. is his brother is one of the conditions of his family existence. He fits into a family of which B. is a member in the same way that one stone fits into an arch of which another stone is part. The position of one presupposes the position of

the other. As to remote relations, the same reasoning applies, though with diminished force. The recognition of such relations forms part of a family atmosphere. The existence of such relationship constitutes the family. A family, in this sense, is an object of immediate instead of mediate perception. To say that A. is a brother, or a cousin, or an uncle, or an aunt, is not hearsay, but primary evidence. But recognition of pedigree is not limited to such conditions. Even where there is no family consensus to be appealed to, what is said by one member of the family to another as to pedigree may be received to prove such pedigree. Hence it is admissible for A. to prove, with the limitations hereafter expressed, what was told him by deceased relatives as to family relations."

We cannot say, therefore, that the plaintiff was an incompetent witness to prove his relationship to the Balser Gehr of Berks county, nor that his testimony was incompetent from the fact that his knowledge upon that subject was derived from his deceased mother. She always told him that Balser Gehr was his uncle. It was a part of their family history; one of their family traditions, furnished by one who had the means of knowledge, and no possible motive to falsify, so far as appears in the case. When the plaintiff testified that Balser Gehr, of Berks county was his uncle, he testified to a fact. The evidence was primary, not secondary. This puts at rest all question of the declarations of Anna Maria Gehr and John Gehr. They are shown to belong to a branch of the Gehr family and from their position as such likely to have had accurate information of the matters to which their declarations referred. The learned judge below thought the connection between the families sufficiently established to admit the evidence, and in this we see no error.

The sixth assignment of error does not require an extended discussion. The evidence rejected does not come within any recognized rule in regard to pedigree. No declarations of any deceased person were offered. It was simply a conversation between two living persons in regard to the Gehr family. Even the conversation was not offered, but merely the conclusion which they drew from it. The offer was properly rejected.

The seventh and eighth assignments relate to the rejection by the court of "the original record of the Kutztown Evangelical Lutheran Church, commencing in 1810, for the purpose of showing the burial record of Hannah Bast, and the names of her parents, place of birth, dates of birth and death, which was the usual way of keeping the record." Objection was made to this because it was not a church record, but merely a private book kept by the pastor, Rev. John Knoske, claimed by him as his private property, and containing a minute of his acts outside as well as inside of the church.

The further objection was made that the record was not evidence of any thing except the death and burial of the person mentioned and the time and place thereof.

The learned judge held that the book in question was a church registry for marriages, deaths, and burials; that it was intended to be kept, and possibly was kept, according to the requirements of the act of 1800; that it would be evidence to show the deaths of Mary Eva Zimmerman and Hannah Bast, but that for the other purposes offered it was incompetent. Without discussing the character of the book, we are of opinion it was properly rejected. It was not alleged that the time of the death of these ladies was material to the issue; on the contrary, the manifest object of the offer was to prove that Hannah Bast was the daughter of Conrad Geehr and Anna Maria, his wife, and to show when and where she was born. This burial list was competent to show the death and burial of these ladies, but what the pastor put down in the book as to their parentage, and the time and place of their birth, was incompetent, for the plain reason that it was no part of his duty to make such entries. Such registers are not, in general, evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer. 2 Phil. Ev. *280. It was held in *Clark v. Trinity Church*, 5 Watts & S. 266, that "an entry in 1811, in the handwriting of the pastor of a church, in a book kept in the church as a registry of baptisms and births, the object of which entry was to register the baptism of a person, and not his birth; and in which the time of the birth is introduced merely by way of description, is not evidence of the date of the birth."

The rule is thus stated by Mr. Greenleaf in his work on Evidence (volume 1, § 493): "A parish register is evidence only of the time of the marriage, and of its celebration *de facto*; for these are the only facts necessarily within the knowledge of the person making the entry. So a register of baptism, taken by itself, is evidence only of that fact, though, if the child were proved *aliunde* to have been then very young, it might afford presumptive evidence that it was born in the same parish. Neither is the mention of the child's age in the register of christenings any evidence of the day of his birth, to support a plea of infancy. In all these and similar cases, the register is no proof of the identity of the parties there named, with the parties in controversy, but the fact of identity must be established by other evidence. It is also necessary in all these cases that the register be one which the law requires should be kept, and that it be kept in the manner required by law." This principle is recognized in most of the leading text-books and numerous decisions in England and in this country. It is sufficient to refer to *Rex v. Clapham*, 4 Car. & P. 29; *Burghart v. Angerstein*, 6

Car. & P. 690; *Williams v. Lloyd*, 39 E. C. L. 595; *Whitcher v. McLaughlin*, 115 Mass. 168; *Blackburn v. Crawfords*, 3 Wall. 189.

We are unable to see any error in the rejection of the mortgage referred to in the ninth assignment. The object of this offer was to show that the Conrad Geehr mentioned by the defendants' witnesses as the father of the Geehrs of Berks county resided in Philadelphia as early as 1739, and that the family of Geehr in Berks county were entirely different from the Lancaster county family of the same name, from whom the plaintiff was descended. The obvious objection to this evidence was that none of the defendants' witnesses speak of any Conrad Geehr residing at Germantown, and the recital in the mortgage in no way connected the Conrad Geehr, who was the mortgagor, with the Conrad Geehr mentioned by the witnesses. The bare fact that a Conrad Geehr lived in Germantown, that he borrowed money and gave a mortgage to some one in Oley township in 1743, many years before Balser Geehr is heard of in that township, would not of itself connect that Conrad with this Balser Geehr. Mere identity of name must be accompanied with some circumstances of time or place before we can attach any value to it as affecting rights of property.

It is true there are some authorities which hold that identity of name is *prima facie* evidence of identity of person. So much was said by Justice Sharswood in *McConeghy v. Kirk*, 18 P. F. Smith, 203. That this is the ordinary rule may be conceded. But it does not apply where the transaction is remote. The true rule is believed to be that laid down by Chief Justice Gibson in *Sailor v. Hertzogg*, 2 Pa. St. 182, where he says: "Identity of name is ordinarily, but not always, *prima facie* evidence of personal identity. The authorities on the subject may be consulted in *Sewell v. Evans*, 4 Adol. & E. 626, from which Lord Denham and other judges of the queen's bench, concluded that identity of name is something from which an inference may be drawn, unless the name were a very common one or the transaction remote; and the reason given for casting the onus on the party who denies is that disproof can be readily had by calling the person whose identity is denied into court. The name in this instance is not a very common one; but, after more than a quarter of a century, there ought certainly to be some preliminary evidence, however small." The soundness of this rule cannot be successfully questioned. It would work great injustice if rights of property, after a great length of time, were allowed to depend upon mere identity of name. A *prima facie* case thus submitted to a jury might be extremely difficult, if not impossible, to disprove. I know of no case in which mere identity of name has been held sufficient after the great lapse of time which exists here.

The assignments from the tenth to the

fourteenth inclusive allege error in the exclusion of a series of voluminous documents from the public records of Lancaster county. To go over these papers in detail would extend this opinion to an inconvenient length, and would serve no good purpose. The object of the offers, as I understand them, was to show the pedigree of the plaintiff's family, and that he was not connected with the Geehr family of Berks county. They show recitals in wills, deeds, mortgages, etc. There are also copies of assessments and other papers. They are, perhaps, the equivalent of the declarations of deceased persons, but there is nothing to connect them, or either of them, with the Baltzer Gehr who is the plaintiff in this suit, or with the Berks county family of Geehr. Hence the objections made by the defendants to the admission of the declarations of Anna Maria Gehr and John Gehr, and which have already been considered, apply with far greater force to these papers. Regarding them as declarations, the declarants are not shown aliunde to belong to either branch of the family. We are of opinion that these records were properly excluded.

There remain but the fifteenth and sixteenth assignments, in which error is assigned to the charge of the court in some brief comments made by the learned judge upon the evidence. If not entirely accurate, they disclose no such error as would justify a reversal.

Judgment affirmed.

(May 16, 1884).

PAXSON, J. A motion has been made for a reargument in the above case, based upon our ruling in regard to the exclusion of the Lancaster county records by the court. The impression appears to prevail that because we dismissed the assignments of error relating to this question without an extended discussion we had not examined it with care, or were misled upon the facts. The first assumption is certainly incorrect. I examined this branch of the case with all the more care from the fact that we were not aided by an extended oral argument. The paper books, however, supplied us with a very careful printed argument, so that the loss of an oral argument was not so important as it may seem to the learned counsel for the plaintiff in error. That the point was not more fully discussed in the opinion was owing to the fact that it had already been extended to what I feared was an unreasonable length in discussing the more important questions of the cause.

A careful re-examination and study of the case has failed to satisfy us that we were misled either upon the facts or the law.

The records referred to were offered to rebut the testimony of the plaintiff and to establish the pedigree of his family in Lancaster county. The plaintiff in his deposition had stated that when he was six years

old (1788), his father, with his family, moved from Cocalico township, Lancaster county, where he had lived on his brother Paul's land; second, that his father's name was Joseph, and that he was the youngest of the family; and third, that his father had three brothers, Paul, Andrew, and John, who lived in the same neighborhood in Lancaster county. The plaintiff did not know his grandfather's name; he never saw him. And then stated that Balser Geehr, of Berks county, was his uncle, upon information derived from his mother.

The defendants attempted to show by the excluded records that Joseph Gehr, the plaintiff's father, and Paul, Andrew, and John Gehr, mentioned in the records of Lancaster county, were brothers; that they were the sons of John Gehr, senior, and hence could not have been the sons of Conrad Geehr, a brother of the Balser Geehr, of Berks county.

The difficulty in the way of the defendants is that there is nothing but identity of name to connect the Gehrs named in the records with the family of the plaintiff. This will not do as to people who died a hundred years ago. The reason and the authority for this position were given in the opinion already filed, and need not be repeated. Not only is there no proof aliunde to connect them, but there is evidence as to Paul and Andrew, at least, which makes their identity more than doubtful. Indeed, it seems hardly possible that they are the Paul and Andrew referred to by the plaintiff. To show the competency of the evidence, the argument was made that the plaintiff had spoken of his father living on his brother Paul's land in Cocalico township, Lancaster county. But we must remember that the plaintiff was born in 1782; he left Lancaster county in 1788, when about six years old, and the records show that the Paul Gehr named therein died in 1773, which was five years before the plaintiff was born. And as to Andrew Gehr the case was still stronger, for the plaintiff testified to having seen his father's brother Andrew, while the Andrew Gehr of the records must have died prior to 1772, according to the records themselves. It is not correct, therefore, to say, that there was proof aliunde to connect these Gehrs with the plaintiff, and that the plaintiff's own deposition furnishes such proof. There is really nothing but identity of name, and even if this were some evidence it would be too weak and inconclusive to base a verdict upon. Unless the plaintiff's case is a fabrication, and the testimony false as to the declarations of the deceased members of his family, his relationship to Balser Geehr, of Berks county, was established. There is nothing in the case to indicate such a fabrication, and if the evidence rejected had been admitted, it would not be sufficient to justify a jury in coming to such a conclusion.

The rejected records do not contradict the plaintiff's testimony. As a pedigree of his family, it rests upon a number of circumstances, each dependent upon the other. With the essential links relating to Paul and	Andrew Gehr broken, the whole superstructure crumbles. We see no sufficient reason to order a re-argument, and the motion therefore is refused.
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FULKERSON et al. v. HOLMES et al.

(6 Sup. Ct. 780, 117 U. S. 389.)

Supreme Court of the United States. March 22, 1886.

In error to the circuit court of the United States for the Western district of Virginia.

This was an action of ejectment. The defendants in error were the plaintiffs in the circuit court, and were the heirs at law of John Holmes, deceased. They brought the action in August, 1871, to recover a tract of 3,000 acres of land in Lee county, in the state of Virginia. The defendants pleaded the general issue. The case was tried by a jury, and there was a verdict for the plaintiffs, on which the court rendered judgment, and the defendants sued out this writ of error.

It appeared from the bill of exceptions that the plaintiffs, to sustain the issue on their part, offered in evidence a patent from the commonwealth of Virginia to Samuel Young, dated May 7, 1787, for the premises in controversy, which was admitted without objection. They next offered a deed for the same premises from Samuel C. Young to John Holmes, dated July 12, 1819. This deed recited the grant by the commonwealth of Virginia to Samuel Young of the premises in controversy; that Samuel Young, the patentee, had died intestate; that Samuel C. Young, the grantor, was his only child and heir; and that the title to said lands had vested in him. Appended to the deed was a certificate of acknowledgment dated July 15, 1819, at the Eastern district of Pennsylvania, purporting to have been taken by Richard Peters, United States judge for the district of Pennsylvania, and signed by him. The deed appeared also to have been witnessed by John Shaw and John Craige. Immediately after the certificate of acknowledgment appeared what purported to be the receipt of Samuel C. Young for the consideration money mentioned in the deed, which was \$10,400, signed by him and witnessed by John Craige. The plaintiffs proved the handwriting of Judge Peters to the certificate, and the death of John Shaw, one of the witnesses, which took place more than 50 years before the trial. Appended to the deed was the following certificate of registration:

"Virginia. At a court begun and held for Lee county, at the court-house thereof, on the fifteenth day of January, 1838, this indenture of bargain and sale for land between Samuel C. Young of the one part, and John Holmes of the other part, was admitted to record upon the certificate of Richard Peters, judge of the Pennsylvania district of the United States. J. W. S. Morrison, D. C."

The deed bore the following indorsement: "Recorded in the clerk's office of the county court of Lee, in book No. 7, page 401. Teste: J. W. S. Morrison, D. C."

The plaintiffs also introduced evidence tending to show that the patent to Samuel Young, and the deed from Samuel C. Young

to John Holmes, were found among the papers of the latter after his death, in 1834. They also offered the testimony of John Holmes, a son-in-law of John Holmes, the grantee of the land, who testified that he knew that said grantee owned a tract of 3,000 acres of land in Lee county, Virginia, and that the deed for the land was in the possession of John Holmes, the elder, at the time of his death; that at the request of one of the executors of John Holmes, the elder, and of the family, the witness, in the year 1836, went to Virginia, to examine the lands; that he took with him a map and plan and two deeds, one being the patent above mentioned for the lands in controversy, the other the deed from Samuel C. Young to John Holmes for the same lands; and that these papers had been in his possession or under his control for a period of 37 or 38 years. On his said visit the witness went upon the lands with Peter Fulkerson, who lived in sight of them, and who, as well as Frederick D. Fulkerson and Mr. Ewing, brother-in-law of the latter, recognized him as representing the owners of the land. It was at that time called the "Holmes Plantation." There were no intruders upon the land, and no one in actual possession. In 1840, Frederick D. Fulkerson treated by letter with the witness for the purchase of the land, and, in 1846, James Fulkerson wrote the witness to learn the least he would take for the land, and repeated his inquiry in the year 1847. It may be here stated that the defendants claimed possession under patents issued, one to the Peter Fulkerson above mentioned, dated October 30, 1838, and another to said Frederick D. Fulkerson and James Fulkerson and Elizabeth Fulkerson, dated October 31, 1846, and by subsequent conveyances from said patentees. Having introduced this evidence the plaintiffs rested.

One of the defenses set up to the action by the defendants was that under the laws of Virginia the lands in controversy had been forfeited to the state, and the title by reason thereof had, ipso facto, reverted to the state, and was therefore out of the plaintiffs. The acts of the state of Virginia applicable to the present case, providing for the forfeiture of lands delinquent for the non-payment of taxes, were as follows: The second section of the act of February 27, 1835, after reciting, by way of preamble, that whereas, it was "known to the general assembly that many large tracts of land lying west of the Alleghany mountains which were granted by the commonwealth before the first day of April, 1831, never were, or have not been for many years last past, entered on the books of the commissioner of the revenue where they respectively lie, * * *" declared that every owner of any such tract of land should, on or before the first day of July, 1836, enter, or cause to be entered, on the books of the commissioner of revenue for the county in which the lands lay, any land owned by

him the title of which came through grants by the commonwealth, and have the same charged with all taxes and damages in arrears properly chargeable thereon, and pay all such taxes and damages which had not been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March 10, 1832; and upon failure to do so such lands, not in the actual possession of said owner, should become forfeited to the commonwealth after the first of July, 1836. Laws Va. 1834, 1835, c. 13, p. 12. The second section of the act of March 10, 1832, referred to in the statute just recited, provided that all taxes and damages due and chargeable on lands lying west of the Alleghany mountains, returned delinquent for the year 1831 or any previous year, and which had not been redeemed, or exonerated by former laws, should be discharged, and, the lien of the commonwealth therefor relinquished, provided said taxes and damages did not exceed \$10. See Laws Va. 1832, c. 73, p. 67. By successive acts of the legislature of Virginia—act of March 23, 1836, (chapter 3, p. 7; Acts 1835-36;) act of March 30, 1837, (chapter 8, p. 9, Acts 1836-37;) act of March 15, 1838, (chapter 8, pp. 16, 17, Acts 1838,)—the time for entering lands upon the books of the commissioners of revenue, and paying the taxes and damages charged thereon, and thereby saving them from forfeiture, was extended to the first day of July, 1838.

In order to prove the forfeiture of the land in controversy to the state of Virginia the defendants introduced "a table of tracts of land in Lee county assessed with taxes," certified on September 5, 1876, by the auditor of public accounts of the state of Virginia. This table showed that three tracts of land, containing in the aggregate 6,300 acres, had been listed for taxation against Samuel Young, of Philadelphia, for the years from 1827 to 1832, inclusive. The taxes on the three tracts for the five years from 1827 to 1831, inclusive, were, according to the table, unpaid, and amounted in all to 38 cents. The taxes for 1832 were marked paid. The auditor of public accounts certified that the books of Lee county prior to 1827 were missing; that the records showed that the taxes on said three tracts of Samuel Young had been paid up to and including the year 1822; that the taxes were released to 1831, inclusive; and that said lands were returned among the unascertainable lands in 1832, and subsequently dropped from the commissioners' books of Lee county.

To rebut this testimony introduced by the defendants the plaintiffs put in evidence the certificate of the deputy-sheriff of Lee county, dated December 14, 1837, to the effect that he had placed a tract of land in the name of Samuel Young for 3,000 acres, which was returned in the year 1834 not ascertainable, on the commissioners' books of said county of Lee, and taxed the damages thereon.

They also introduced "an extract," certified September 5, 1875, by the auditor of public accounts, "from the land-books of the commissioners of the revenue for the county of Lee, for the years 1838 to 1875, both inclusive, * * *" of lands assessed successively to John Holmes, John Holmes, Jr., and John Holmes' estate, for each of said years. The extract showed that a tract of 3,000 acres of land, conveyed by Samuel C. Young, was listed for taxation to John Holmes and John Holmes, Jr., of Philadelphia, and to the estate of John Holmes, for the years above mentioned. The taxes down to 1874, excepting one year, appeared to have been paid or released by law.

John A. Buchanan, for plaintiffs in error.
Wm. Pinkney Whyte, Patrick Hagan, and John A. Campbell, for defendants in error.

WOODS, J. It is first assigned, for error that the circuit court "allowed the deed from Samuel C. Young to John Holmes to be read in evidence without instructing the jury that the recitals therein in respect to the death of Samuel Young and the heirship of Samuel C. Young were not evidence against the defendants, even if it were admissible at all, without proof of its execution or possession accompanying and held under it." The deed of Samuel C. Young to John Holmes was rightfully admitted in evidence as an ancient deed, without proof by the subscribing witnesses, or of possession by the plaintiffs or those under whom they claimed. When offered it was more than 60 years old. It was produced from the custody of the heirs of John Holmes, the grantee, who claimed the lands described therein. It, as well as the patent for the same land from the commonwealth of Virginia to Samuel Young, was shown to have been found among the papers of John Holmes. The lands described therein were shown to have been listed for taxation to John Holmes, or to his heirs, for a period beginning with the year 1838 down to and including the year 1875, which was after the bringing of this suit; and it appeared that during that time they had paid the taxes assessed on said lands, or the same had been released to them by law. It was further shown that the judge before whom the acknowledgment of the deed had been made was dead; that his signature to the certificate of acknowledgment was genuine; that the deed had been recorded in the county where the lands lay for more than 42 years before it was offered in evidence; and that before and after the deed was put upon record the lands described therein were reported to be the lands of John Holmes, the grantee, and his heirs, and were known and designated in the neighborhood where they lay as the "Holmes Plantation." This state of facts amply justified the admission of the deed in evidence as an ancient document, without other proof. *Caruthers v. Eldridge*, 12 Grat. 670; *Applegate v. Mining Co.*, 6

Sup. Ct. 742 (decided at the present term), and cases there cited.

The question is therefore fairly presented whether the recitals made in the deed of Samul C. Young to John Holmes, to the effect that Samuel Young, the patentee, had died intestate, leaving one child only, namely, the said Samuel C. Young, the grantor, were admissible in evidence against the defendants, who did not claim title under the deed. The fact to be established is one of pedigree. The proof to show pedigree forms a well-settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of necessity; for as in inquiries respecting relationship or descent facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice. *Tayl. Ev.* § 635. Traditional evidence is therefore admissible. *Jackson v. Cooley*, 8 Johns. 99; *Jackson v. Browner*, 18 Johns. 37; *Jackson v. King*, 5 Cow. 237; *Davis v. Wood*, 1 Wheat. 6. The rule is that declarations of deceased persons who were de jure related by blood or marriage to the family in question may be given in evidence in matters of pedigree. *Jewell v. Jewell*, 1 How. 219; *Blackburn v. Crawfords*, 3 Wall. 175; *Johnson v. Lawson*, 2 Bing. 86; *Vowles v. Young*, 13 Ves. 147; *Monkton v. Attorney General*, 2 Russ. & M. 159; *White v. Strother*, 11 Ala. 720. A qualification of the rule is that before a declaration can be admitted in evidence the relationship of the declarant with the family must be established by some proof independent of the declaration itself. *Monkton v. Attorney General*, 2 Russ. & M. 156; *Attorney General v. Kohler*, 9 H. L. Cas. 660; *Rex v. All Saints*, 7 Barn. & C. 780. But it is evident that but slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy.

Applying these rules, we are of opinion that the recital in the deed of Samuel C. Young to John Holmes, supported as it was by the circumstances of the case shown by the evidence, was admissible, as tending to prove the facts recited, namely, that Samuel Young, the patentee, was dead, and Samuel C. Young, the grantor, was his only child and heir.

As the deed in which the recital was made was entitled to be admitted in evidence, it stands upon the same footing as if its execution had been proved in the ordinary way. The fact, therefore, that on the twelfth day of July, 1819, the date of the deed, in the city of Philadelphia, before Richard Peters, United States judge, and two other persons as witnesses, Samuel C. Young, the grantor in the deed mentioned, made the declarations in question, may be taken as established.

It is not disputed that when, upon the trial of the case in the circuit court in October, 1880, the deed containing the recitals was offered in evidence, the declarant, Samuel C. Young, was dead. It only remained, therefore, to offer some evidence that the declarant, Samuel C. Young, was related to the family of Samuel Young. One circumstance relied on to show his relationship was the similarity of names. This, after the lapse of so great a time, was entitled to weight. Another fact was that the patent to Samuel Young for the land in controversy was found with the deed of Samuel C. Young to John Holmes among the papers of the latter after his death. The well-known practices and habits of men in the transfer of title make it clear that the patent was delivered to Holmes by Samuel C. Young when the latter delivered his own deed to Holmes for the premises conveyed by the patent. There was therefore persuasive proof that on January 12, 1819, Samuel C. Young had in his possession, claiming it as a muniment of his title, the patent issued by the commonwealth of Virginia to Samuel Young, and the presumption is that his possession of the patent was rightful. The fact that Samuel C. Young, representing himself to be the son and heir of Samuel Young, had in his rightful possession the title papers of the latter to a valuable estate, is a fact tending to prove the truth of his asserted relationship. Another circumstance of weight is that Samuel C. Young, having assumed, as the son and sole heir of Samuel Young, to convey the landed estate of the latter, and his grantees having for more than 60 years claimed title under his conveyance, the right of Samuel C. Young to make the conveyance has never, so far as appears, been questioned or challenged by any other person claiming under Samuel Young. After a lapse of 61 years we think these circumstances were sufficient to prove that Samuel C. Young was of the family of Samuel Young, and that the declaration of the former, deliberately made in an ancient writing, signed, sealed, witnessed, acknowledged, and recorded, to the effect that the declarant was the only child and heir of Samuel Young, and that the latter was dead, was of right admitted in evidence as tending to prove the facts so recited. This conclusion is sustained by the case of *Deery v. Cray*, 5 Wall. 795, which is directly in point. See, also, *Carver v. Astor*, 4 Pet. 1; *Crane v. Astor*, 6 Pet. 598; *Garwood v. Dennis*, 4 Bin. 314; *Stokes v. Dawes*, 4 Mason, 268; *Jackson v. Cooley*, 8 Johns. 99. In view, therefore, of the circumstances of the case, there was no error in the refusal of the court to instruct the jury that said recital was not evidence against the defendants.

The next and only other ground of error alleged by the defendants is that the court refused to charge the jury on the question of forfeiture. We think there was no error here. The forfeiture of the lands in contro-

versy is alleged to have occurred by virtue of the provisions of the second section of the act of February 27, 1835. Two classes of lands were declared subject to forfeiture by this act. The first was lands which had never been entered upon the books of the commissioners of revenue for the county in which the lands lay. There is a failure to show that the lands in question had never been listed for taxation upon the books of the commissioners of Lee county, within whose limits they were included. It is true the certificate of the auditor of public accounts, introduced by the defendants, states that the records of Lee county prior to 1827 are missing; but it can hardly be maintained that when a party shows his inability to prove an essential fact, the fact may be inferred from his inability to prove it. But the same certificate shows that the lands of Samuel Young were placed on the books of the commissioners of Lee county for six years, namely, from 1827 to 1832, inclusive, and that the taxes on the same lands had been paid up to and including the year 1822. Upon the showing of the defendants themselves, it appears that the lands in question do not belong to the class which had never been entered upon the books of the commissioners of revenue.

Nor are the defendants any more successful in showing that the lands in controversy fell within the second class liable to forfeiture, namely, those which for many years previous to February 27, 1835, the date of the act declaring the forfeiture, had not been entered upon the books of the commissioners of revenue. For, referring to the second section of the act of March 10, 1832 (Laws Va. 1832, c. 73, p. 67), it appears that only those tracts of land on which the unpaid taxes exceeded \$100 were liable to forfeiture under the act of February 27, 1835. There is no proof that the taxes and damages on the lands in question exceeded that amount. On the contrary,

if the table of lands showing the taxes thereon for the years 1827 to 1832, inclusive, certified by the auditor of public accounts, includes the lands in controversy, as the defendants contend, the taxes thereon for all the years stated amounted to only 38 cents, and the taxes were therefore released and relinquished by the second section of the act of March 10, 1832; and if this table did not include the lands in controversy, then there is an entire failure to show what the taxes were. The defendants, therefore, have failed to prove that the lands in controversy were liable to forfeiture under the act of February 27, 1835.

But there is affirmative proof that no forfeiture could have occurred, for the time for entering the lands on the commissioners' books for taxation, and for paying the taxes, and thereby preventing forfeiture, was extended, as has been stated, to the first day of July, 1838; and it was shown by the certificate of Crabtree, the deputy-sheriff, that as early as December 14, 1837, the lands in controversy were placed upon the tax-books, and the damages thereon taxed; and it was further shown that the state of Virginia never claimed the lands as forfeited, but, from the year 1838 down to the beginning of this suit, a period of more than 33 years, had assessed and collected taxes therefor from the plaintiffs and those under whom they claim. It follows that the failure to show a forfeiture of the lands under the act of February 27, 1835, was complete. It would, therefore, have been the duty of the court, if it gave any instruction upon this branch of the defense, to say to the jury that the defendants had failed to maintain it. It can hardly be urged by them, as a ground for the reversal of the judgment, that the court did not so charge. *Brobst v. Brock*, 10 Wall. 519; *Phillips Const. Co. v. Seymour*, 91 U. S. 646.

Judgment affirmed.

WIGHT FIRE-PROOFING CO. v. POCZEKAI.

(22 N. E. 543, 130 Ill. 139.)

Supreme Court of Illinois. Oct. 31, 1889.

Appeal from appellate court, first district.

Action by Peter Poczeka for the use of James G. Weart against the Wight Fire-Proofing Company. Defendant appeals.

Wm. Eliot Furness, for appellant. *Nelson Monroe*, for appellee.

BAKER, J. Appellee recovered judgment in the superior court of Cook county in case for \$2,000, and on appellant's appeal the judgment was affirmed by the appellate court of the first district. Busse & Sturtevant had the contract for the mason-work on a building which the Phoenix Insurance Company of Brooklyn was erecting on the south-west corner of Clark and Jackson streets, in Chicago, and appellee was working for them. On December 6, 1886, the mason-work was finished, and appellee was employed with others in lowering certain planks, which had been used by the masons for scaffolding, from the attic floor of the unfinished building through an elevator way, by means of a rope, to the floor below. In the performance of this duty and at the time he was injured appellee was using due and ordinary care. Over him, on the frame-work of the roof, some of the servants of the appellant were at work. Appellant had a contract for doing the fire-proofing of the building, and its servants on the frame of the roof composed a gang of three or four men who were preparing the centerings, so called, necessary to be put in place in order to enable the appellant to lay the fire-proof arches between the girders forming the frame of the roof. The centerings were a sort of platform supported from above, built close to and under the girders, on which the tiles of the arches, flat on the under side, were laid, and rested until the mortar with which they were built should harden, and on which the workmen employed in springing the arches stood while working. The appellant had nothing to do with the iron-work of the building, and the girders of the roof had been put in place by a contractor who had done the iron-work. They ran north and south, were some six or seven feet apart, and, as the morning in question was frosty, they were slippery. The centering gang were working over that part of the attic floor where appellee was at work, and Lynch, the foreman of the gang, in stepping around upon the roof girders, stepped on a short iron girder weighing five or six hundred pounds, and loose at both ends, which was no part of the roof, and which was lying east and west across the north and south girders, which were in that place about as far apart as the short girder was long. Lynch called the attention of Lee, another of appellant's workmen, to the fact of the loose girder. A few moments thereafter he or-

dered Lee to go below to the attic floor, and tie the timber cross-pieces to a rope, by which he (Lynch) would haul them up. This order was obeyed by Lee, and when the rope was tied to one of the cross-pieces he notified Lynch to pull up. The latter at this time was standing with the rope on one of the girders this loose girder was resting on, and not more than three or four feet away from it. Lee, who was a witness for appellee, stated in his testimony: "As he [Lynch] hauled away I looked up after the cross-piece, and as the cross-piece got up I seen this girder turn over on its end and drop." This short girder, in falling, struck appellee, and inflicted upon him the injuries to recover damages for which the suit was brought.

Several grounds are urged for the reversal of the judgment. It is claimed there is a variance between the declaration and the evidence in respect to the acts of negligence which caused the injury. The variance suggested does not seem to be of a very substantial character, but, be this as it may, appellant cannot now avail himself of it. It does not appear from the record that any claim of variance on the ground now indicated was made in the trial court; and if there made, and deemed essential, it could readily have been obviated by amendment. The failure of appellant to there object on the ground of the variance must be regarded as a waiver of the objection. *City of Elgin v. Kimball*, 90 Ill. 356; *Railroad Co. v. Estes*, 96 Ill. 470; *Society v. Fietsam*, 97 Ill. 474.

The main ground of alleged error is that when appellee rested his case the superior court denied the motion of appellant to direct the jury to return a verdict for the defendant. The gist of the action was the alleged negligence of the defendant, through its servants, and that such negligence was the proximate cause of the injury to the plaintiff. There was evidence before the jury tending to prove both of these propositions. The foreman of appellant knew the girder was loose, and that it rested upon frosty and slippery iron supports; and whether or not it was culpable negligence, under such circumstances, to stand upon the supporting girder, and in such close proximity to the short and loose girder, and pull up timbers from below with a rope, was a proper question of fact for the determination of the jury. As the cross-piece got up to where Lynch was standing, not more than three or four feet from the girder, the girder was seen to turn on its end and fall. We are unable to say, as matter of law, it was not a legitimate inference and conclusion for a jury from this testimony, taken in connection with the other circumstances in proof, that the timber or rope with which it was hauled came in contact with the girder, and caused one end of it to slide from its support. There was no error in the action of the court in refusing to take the case from the jury.

The court sustained objections to two

questions asked of the witness Wight, and such refusal is assigned as error. The questions were as follows: "Placing the centering boards in position, what effect would it have as to any mass of plank resting on top of the beams, with reference to its reaching or falling below?" and, "When the centering beams are in position, can anything fall from above down below?" Such ruling was not erroneous, and for two sufficient reasons. In the first place, the rule is that, as to matters which do not so far partake of the nature of a science as to require a course of previous habit or study in order to an attainment of a knowledge of them, the opinions of witnesses, though experts, are not admissible as evidence. *Pennsylvania Co. v. Conlan*, 101 Ill. 93, and authorities there cited. Besides this, the negligence here in issue was not in the mere act of placing the centering boards in position, but was in the alleged negligent manner in which the servants of appellant proceeded in getting ready for the performance of such work.

It is not claimed it was error to refuse the last instruction in the series asked by appellant, but it is insisted the modification made therein by the court rendered it erroneous. The modification made was the inser-

tion of the word "sufficient." The conclusion of the instruction, as given to the jury, was as follows: "If the fact of negligence be doubtful from the evidence, the defendant is entitled to the verdict. The fact of an accident having occurred is not of itself sufficient evidence of negligence." It would seem that the fact the girder did fall affords some evidence that it was lying in such condition and position upon the beams as that it was liable to be precipitated below, where appellee and others were at work, if a moving body came in contact with it. The servants of appellant knew it was there, and were fully advised that it was loose, and that the irons which supported it were frosty and slippery, and we see no good reason why the fact it actually fell should have been wholly excluded from the jury in the consideration of the question of the alleged negligence. The court told the jury, in substance, that the fact it fell did not establish negligence, but, beyond that, left the question of negligence to be determined by the jury upon all the evidence before them. We are unable to see that appellant has any cause of complaint in this action of the court. We find no error in the record, and the judgment of the appellate court is affirmed.

McKILLOP v. DULUTH ST. RY. CO.

(55 N. W. 739, 53 Minn. 532.)

Supreme Court of Minnesota. June 21, 1893.

Appeal from district court, St. Louis county; Ensign, Judge.

Action by Alexander McKillop against the Duluth Street-Railway Company to recover for personal injuries received while plaintiff was lying in a public highway on defendant's track, in an unconscious condition. Plaintiff had judgment, and defendant appeals. Reversed.

Billson & Congdon, for appellant. Edson & Edson, for respondent.

GILFILLAN, C. J. The court below erred in excluding the opinions of the witnesses that plaintiff was intoxicated. It was hardly a question for expert testimony, so that—the facts and circumstances, his acts, appearance, and speech, being detailed by other witnesses—a witness might be called to state whether, in his opinion, they indicated intoxication, for the matter being one of observation, and not of science or skill, the jury can judge, from the details given, as well as any one, to whom they might be stated. But there are certain conditions, mental or physical, or both together, the indications of which it is impossible for any witness to adequately describe, so that the relation of them shall have on the mind of the jury the same effect that witnessing them legitimately had on the mind of the spectator. In such cases, from necessity, so that the matter may be fully laid before the jury, the spectator may state the effects the acts, appearance, and speech had on his mind; that is, may give his opinion as to the condition they indicated. It is so in respect to joy, grief, hope, or despondency, (*Tobin v. Shaw*, 45 Me. 331;) friendliness or hostility, (*Blake v. People*, 73 N. Y. 586;) fright, (*Brownell v. People*, 38 Mich. 732; *Darling v. Westmoreland*, 52 N. H. 401;) jests or earnest, (*Ray v. State*, 50 Ala. 104;) offensive or insulting manner, (*Raisler v. Springer*, 38 Ala. 703.) So that a person appears to be well or ill, or acts sanely or otherwise. *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. Rep. 164. So a witness not an expert, who testifies to acts and declarations showing an opportunity to form an opinion, may give his opinion, based on such facts, of mental

capacity. *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. Rep. 894. That another cause of plaintiff's demeanor was suggested by the evidence made no difference with the propriety of allowing the witnesses to give their opinions as to his intoxication. It was for the jury to determine what caused such demeanor,—an injury or intoxication; and it was necessary, in order to do so, that they have all the evidence before them. If intoxication was the cause of plaintiff's falling, and lying in a helpless condition, on defendant's track, it was contributory negligence on his part.

The defendant's offer specified in the fourth assignment of error was rightly excluded. A municipal corporation has, through its council, control and charge of the streets, and may regulate the laying of street-railway tracks upon them; and if the council directs the railway company to lay the tracks upon a specified level or grade, and so laying them makes the street unsafe for ordinary travel, the municipal corporation would doubtless be liable for injuries resulting therefrom. But it could hardly be said that so laying them would be an act of negligence on the part of the railway company. The offer did not propose to show any such direction, or even authority, from the council, but only that, the village engineer having indicated by stakes a grade for paving the street contemplated and contracted for, the railway company, in anticipation of such intended paving, laid its tracks in accordance with the grade thus indicated. That the street was, some time in the future, to be brought to that grade, was no authority to the company to at once lay the tracks according to it, if so doing would render the street unsafe, and thus rendering it unsafe would be negligence with respect to any one injured in consequence.

The evidence of the witness Labby, objected to, was proper.

As there must be a new trial, for the error first above specified, it is unnecessary to consider the assignments of error based upon the charge of the court, further than to say that in the part of the charge specified in the ninth assignment the rule of care required of defendant, under the circumstances, might be understood by the jury more strongly than, we suspect, the trial court intended. Order reversed.

CONNECTICUT MUT. LIFE INS. CO. v. LATHROP.

(4 Sup. Ct. 533, 111 U. S. 612.)

Supreme Court of the United States. May 5, 1884.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Jeff. Chandler, for plaintiff in error.

Wallace Pratt and Jeff. Brumback, for defendant in error.

HARLAN, J. This is a writ of error from a judgment in favor of Helen Pitkin, the beneficiary in two policies issued by the Connecticut Mutual Life Insurance Company upon the life of her husband,—one, on the tenth day of August, 1866, for the sum of \$5,000; and the other, on the twenty-fourth day of September, 1873, for the sum of \$423. The insured, George E. Pitkin, died on the twenty-ninth day of September, 1878. After the case came here, the beneficiary in the policies died, and there was a revivor against her personal representative. The defense was the same as to each policy. Briefly stated, it is this: That the policy expressly provides that in case the insured shall, after its execution, become so far intemperate as to impair his health, or induce delirium tremens, or should die by his own hand, it shall be void and of no effect; that, after its execution and delivery, he did become so far intemperate as to impair his health, and induce delirium tremens; also, that he died by his own hand, because, with premeditation and deliberation, he shot himself through the heart with a bullet discharged by himself from a pistol, by reason whereof he died. Further, that the affirmative answer by plaintiff, in her application for insurance, to the question whether the insured was then and had always been of temperate habits, being false and untrue, the contract was annulled, because, by its terms, the policy was to become void if the statements and representations in the application—constituting the basis of the contract between the parties—were not in all respects true and correct. The plaintiff, in her reply, put in issue all the material allegations of the answer, except that alleging the self-destruction of her husband; as to which she averred that, “at the time he committed said act of self-destruction, and with reference thereto,” he “was not in possession of his mental faculties, and was not responsible for said act.”

At the close of the evidence introduced for the plaintiff, the defendant, by counsel, moved the court to instruct the jury that upon the pleadings and evidence the plaintiff could not recover. That motion was denied, and the action of the court—to which the defendant at the time excepted—is assigned for error. This instruction, it is claimed,

should have been given upon the ground that the evidence disclosed no symptom whatever of insanity upon the part of the insured. But that position cannot be sustained upon any proper view of the testimony. There certainly was evidence tending to show a material, if not radical, change for the worse in the mental condition of the insured immediately preceding his death. In the judgment of several who knew him intimately, and had personal knowledge of such change, he was not himself at the time of the act of self-destruction. Whether his strange demeanor immediately before his death was the result of a deliberate, conscious purpose to feign insanity, so as thereby the more readily to defraud the company, was a matter peculiarly within the province of the jury to determine. If the refusal of the court to sustain the motion would have been error, had there been an entire absence of proof to sustain the plaintiff's suit, it is sufficient to say that there was evidence of a substantial character tending to show that the insured was insane when he took his life.

In *Insurance Co. v. Rodel*, 95 U. S. 238, where the question was made as to the duty of the court, on a motion by the defendant for a peremptory instruction based wholly on plaintiff's evidence, it was said that “if there was any evidence tending to prove that the deceased was insane when he took the poison which caused his death, the judge was not bound to, and, indeed, could not properly, take the evidence from the jury. The weight of the evidence is for them, and not for the judge, to pass upon.”

The case clearly comes within the rule announced in *Insurance Co. v. Doster*, 106 U. S. 32, 1 Sup. Ct. 18, that “where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound legal discretion, to set aside a verdict returned in opposition to it.”

When the evidence was concluded on both sides the defendant submitted requests for instructions. Some of them were given and some refused, but it does not appear from the record which were given and which refused. As the exception which was taken related to the refused instructions, and since it does not appear which of them belonged to that class, none of the series asked by defendant can be noticed. We may, however, remark that the charge of the court, to which no exception was taken, embodied all of defendant's instructions that were applicable to the case, and which could properly have been given.

This brings us to the consideration of the substantial questions presented by the assignments of error. They relate to the ad-

mission, against the objections of the defendant, of certain evidence touching the condition of the mind of the insured at or about the time he destroyed his life.

Before the introduction of the particular testimony to which the objections related, there was, as we have already said, proof tending to show that Pitkin was not entirely sound in mind. Witnesses well acquainted with him remarked the unusually excited, wild expression of his face. A domestic in his family testified that "he looked very wild and frightened out of his eyes; he looked like some one that was crazy." Within a few hours before death he bade one witness, whose store he visited, good-bye, saying that he was "going to a country where there is no return." To another witness, on the same occasion, he appeared to be "out of his head; kind of mad, insane."

At this stage of the case one Strein was introduced as a witness for plaintiff. Pitkin was in his saloon about 11 o'clock of the day on which he took his life, and a few hours only before his death. So much of his examination (omitting the questions) as is necessary to a proper understanding of the objections made by plaintiff in error is here given: "Answer. He asked for a glass of wine, and I gave it to him. He said he hadn't had a drink yet that day, or since the one he had last night from me,—that was a glass of wine. He said, 'I may look queer this morning or drunk to other people, but I ain't drunk.' He said, 'Some people may think me drunk, but I am not; I am not drunk in my body, but I am in my mind.' He looked unusual to me. He had on his old clothes, and his neck-tie was out of shape, his face was red, and his eyes staring at me, which made me think he was quite out of his usual way. His appearance and the look was quite different from his usual appearance prior to that time. He looked, in his face, quite red, and his eyes had quite another expression. He had them open wide, with a look that was wild, and he looked around the room awhile and walked up and down, and seemed very restless. He would not stand at one place like he usually did, but walked up and down. I spoke a few words after that, but I did not notice him very much, for I was very busy." The witness being asked to state the impression made upon him by what he saw of Pitkin's condition, the defendant objected to the question as incompetent. But the objection was overruled, and an exception was taken. The witness answered: "My impression was that he seemed to be quite out of his head that morning. I could not say the reason. I didn't know then anything about his disappointment; I found that out afterwards."

Another witness, Mr. Ferry, an attorney at law, was introduced by the plaintiff. He saw Pitkin the morning of the day he killed himself. What occurred was thus stated by him:

"I came down Broadway, walking, and Mr. Pratt came down from his residence on Washington street, in a street car, and got out on the corner of Sixth and Broadway, and we went there in front of the office. Mr. Pitkin was standing very near the door, and as we passed up the stairway going to our office we both said, 'Good morning' to him, and Mr. Pratt says, 'Pit., why ain't you at church?' Mr. Pitkin said, 'I am not going to church, I am going to hell;' and we immediately passed on up stairs and into the doorway, but as we started up stairs Pitkin stuck his head into the door and says, 'Do you want to send any word to him?' Mr. Pratt says, 'To whom?' 'To the devil; I am going to hell,' and he turned immediately and went out of the door." Being asked how Pitkin looked during that conversation, he said that "he seemed very much agitated and nervous; his face was flushed; the pupil of his eye dilated and bright, and there was no expression in it." Against the objections of defendant he was permitted to testify that the impression left on his mind, from the conduct, actions, manner, expressions, and conversation of Pitkin, was that "he was crazy, and didn't know what he was doing."

Exception was also taken to the action of the court in permitting the witness Aldrich to answer a certain question. He saw the deceased a few moments before his death, and observed that he "looked strange;" had "a very peculiar look," one that he had never seen before. It was "a wild look." Being asked what impression Pitkin made upon him by his manner and conduct at the time, he answered,—the defendant's objection to the evidence being overruled,—"I thought he was out of his head."

It is contended, in behalf of plaintiff in error, that the impressions and opinions of these non-professional witnesses as to the mental condition of the insured, although accompanied by a statement of the grounds upon which they rested, were incompetent as evidence of the fact of insanity. This question was substantially presented in *Insurance Co. v. Rodel*, *ubi supra*, which was an action upon a life policy containing a clause of forfeiture in case the insured died by his own hand. The issue was as to his sanity at the time of the act of self-destruction. Witnesses acquainted with him described his conduct and appearance at or about, and shortly before, his death. They testified as to how he looked and acted. One said that he "looked like he was insane," another, that his impression was that the insured "was not in his right mind." In that case the court said that "although such testimony from ordinary witnesses may not have great weight with experts, yet it was competent testimony, and expressed in an artificial the impressions which are usually made by insane persons upon people of ordinary understanding." The general rule undoubtedly is that witnesses are restricted to proof of facts within their personal knowl-

edge, and may not express their opinion or judgment as to matters which the jury or the court are required to determine, or which must constitute elements in such determination. To this rule there is a well-established exception in the case of witnesses having special knowledge or skill in the business, art, or science, the principles of which are involved in the issue to be tried. Thus the opinions of medical men are admissible in evidence as to the sanity or insanity of a person at a particular time, because they are supposed to have become, by study and experience, familiar with the symptoms of mental disease, and therefore qualified to assist the court or jury in reaching a correct conclusion. And such opinions of medical experts may be based as well upon facts within their personal knowledge, as upon a hypothetical case disclosed by the testimony of others. But are there no other exceptions to the general rule to which we have referred?

Counsel for the plaintiff in error contends that witnesses who are not experts in medical science may not, under any circumstances, express their judgment as to the sane or insane state of a person's mind. This position, it must be conceded, finds support in some adjudged cases as well as in some elementary treatises on evidence. But, in our opinion, it cannot be sustained consistently with the weight of authority, nor without closing an important avenue of truth in many, if not in every case, civil and criminal, which involves the question of insanity. Whether an individual is insane, is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common sense, and, we may add, the natural instincts of mankind reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which all men have more or less knowledge, according to their mental capacity and habits of observation,—matters about which they may and do form opinions sufficiently satisfactory to constitute the basis of action. While the mere opinion of a non-professional witness, predicated upon facts detailed by others, is incompetent as evidence upon an issue of insanity, his judgment, based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value; because the natural and ordinary operations of the human intellect, and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by every one of ordinary intelligence who comes in contact with his species. The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached. It will also depend, in part, upon the degree

of the mental unsoundness of the person whose condition is the subject of inquiry; for his derangement may be so total and palpable that but slight observation is necessary to enable persons of ordinary understanding to form a reasonably accurate judgment as to his sanity or insanity; in other cases, the symptoms may be of such an occult character as to require the closest scrutiny and the highest skill to detect the existence of insanity.

The truth is, the statement of a non-professional witness as to the sanity or insanity, at a particular time, of an individual, whose appearance, manner, habits, and conduct came under his personal observation, is not the expression of mere opinion. In form it is opinion, because it expresses an inference or conclusion based upon observation of the appearance, manner, and motions of another person, of which a correct idea cannot well be communicated in words to others without embodying, more or less, the impressions or judgment of the witness. But in a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual, as sane or insane, is a fact, and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact; not, indeed, a fact established by direct and positive proof, because in most, if not all cases it is impossible to determine, with absolute certainty, the precise mental condition of another; yet, being founded on actual observation, and being consistent with common experience and the ordinary manifestations of the condition of the mind, it is knowledge, so far as the human intellect can acquire knowledge upon such subjects. Insanity "is a disease of the mind which assumes as many and various forms as there are shades of difference in the human character." It is, as has been well said, "a condition which impresses itself as an aggregate on the observer," and the opinion of one, personally cognizant of the minute circumstances making up that aggregate, and which are detailed in connection with such opinion, is, in its essence, only fact "at short-hand." 1 Whart. & S. Med. Jur. § 257. This species of evidence should be admitted, not only because of its intrinsic value, when the result of observation by persons of intelligence, but from necessity. We say from necessity, because a jury or court, having had no opportunity for personal observation, would otherwise be deprived of the knowledge which others possess; but, also, because, if the witness may be permitted to state—as, undoubtedly, he would be where his opportunities of observation have been adequate—"that he has known the individual for many years; has repeatedly conversed with him and heard others converse with him; that the witness had noticed that in these conversations he was incoherent and silly; that in his habits he was occasionally highly pleased and greatly vexed without a cause; and that in his conduct he was wild,

irrational, extravagant, and crazy,—what would this be but to declare the judgment or opinion of the witness of what is incoherent or foolish in conversation, what reasonable cause of pleasure or resentment, and what the indicia of sound or disordered intellect? If he may not so testify, but must give the supposed silly and incoherent language, state the degrees and all the accompanying circumstances of highly excited emotion, and specifically set forth the freaks or acts regarded as irrational, and thus, without the least intimation of any opinion which he has formed of their character, where are such witnesses to be found? Can it be supposed that those, not having a special interest in the subject, shall have so charged their memories with these matters, as distinct, independent facts, as to be able to present them in their entirety and simplicity to the jury? Or, if such a witness be found, can he conceal from the jury the impression which has been made upon his mind; and, when this is collected, can it be doubted but that his judgment has been influenced by many, very many, circumstances which he has not communicated, which he cannot communicate, and of which he himself is not aware?" *Clary v. Clary*, 2 Ired. Law, 83. The jury, being informed as to the witness' opportunities to know all the circumstances, and of the reasons upon which he rests his statement as to the ultimate general fact of sanity or insanity, are able to test the accuracy or soundness of the opinion expressed, and thus, by using the ordinary means for the ascertainment of truth, reach the ends of substantial justice.

These views are sustained by a very large number of adjudications in the courts of this country, some of which are cited in the margin.¹ In several of those cited the whole subject was very fully considered in all its aspects. While the cases are, to some extent, in conflict, we are satisfied that the rule most consistent with sound reason, and sustained by authority, is that indicated in this opinion.

Counsel for the plaintiff in error calls our attention to the case of *Wright v. Tatham*, 5 Clark & F. 670, as an authority for the broad proposition that non-professional witnesses cannot give their opinions and impressions

concerning the state of a person's mind, even in connection with the facts within their personal knowledge, upon which such opinion is based. On a question of the competency of a party to make a will, certain letters, written to that party by third persons, who had died before they were offered as evidence, and which letters were found many years after their date among the testator's papers, were held, in that case, not to be admissible without proof that he acted on them. Whether the opinions of non-experts, in connection with a statement, under oath, of the facts, are admissible upon an inquiry as to the insanity of an individual, was not involved or determined in that case. On the contrary, the observations made by some of the judges, in illustration of their opinions upon the precise point in judgment, would indicate a concurrence in the general views we have expressed. After stating that the letters were offered as evidence of the opinions of the writers, Baron Alderson said: "The objection of their admissibility is that this opinion is not upon oath, nor is it possible for the opposite party to test by cross-examination the foundation on which it rests. The object of laying such testimony before the jury is to place the whole life and conduct of the testator, if possible, before them, so that they may judge of his capacity; for this purpose you call persons who have known him for years, who have seen him frequently, who have conversed with him or corresponded with him. After having thus ascertained their means of knowledge, the question is put generally as to their opinion of his capacity. I conceive this question really means to involve an inquiry as to the effect of all the acts which the witnesses have seen the testator do for a long series of years, and the manner in which he was, during that period, treated by those with whom he was living in familiar intercourse. This is not properly opinion, like that of experts; but rather a compendious mode of putting one instead of a multitude of questions to the witness under examination, as to the acts and conduct of the testator." 5 Clark & F. 720. And Baron Parke: "These letters are sufficiently proved to have been written and sent to the house of the deceased by persons now dead,

¹ *Clary v. Clary*, 2 Ired. Law, 83; *Dunham's Appeal*, 27 Conn. 193; *Grant v. Thompson*, 4 Conn. 203; *Hardy v. Merrill*, 56 N. H. 227, substantially overruling *Boardman v. Boardman*, 47 N. H. 120; *State v. Pike*, 49 N. H. 399, and *State v. Archer*, 54 N. H. 468; *Hathaway's Adm'r v. Insurance Co.*, 48 Vt. 350; *Morse v. Crawford*, 17 Vt. 499; *Clark v. State*, 12 Ohio, 483; *Gibson v. Gibson*, 9 Yerg. 330; *Potts v. House*, 6 Ga. 324; *Vanauken's Case*, 10 N. J. Eq. 190; *Brooke v. Townshend*, 7 Gill, 10; *De Witt v. Barly*, 17 N. Y. 342, explaining decision in same case in 9 N. Y. 371; *Hewlett v. Wood*, 55 N. Y. 634; *Clapp v. Fullerton*, 34 N. Y. 190; *Rutherford v. Morris*, 77 Ill. 397; *Duffield v. Morris' Ex'r*, 2 Har. 384; *Wilkinson v. Pearson*, 23 Pa. St. 119; *Pidcock v. Potter*, 68 Pa. St. 342; *Doe v. Reagan*, 5 Blackf. 218; *Dove v. State*, 3 Heisk. 348; *But-*

ler v. St. Louis Life Ins. Co., 45 Iowa, 93; *People v. Sanford*, 43 Cal. 29; *State v. Klinger*, 46 Mo. 229; *Holcomb v. State*, 41 Tex. 125; *McClackey v. State*, 5 Tex. App. 320; *Norton v. Moore*, 3 Head, 482; *Powell v. State*, 25 Ala. 28; 1 Bish. Cr. Proc. §§ 536-540; 1 Whart. & S. Med. Jur. § 257; *Whart. Ev.* § 510 et seq.; 1 Redf. Wills, c. 4, pt. 2, in a recent edition of which (page 145, note 24) it is said, touching the decision in *Hardy v. Merrill*, *ubi supra*: "There will now remain scarcely any dissentients among the elder states; and those of recent origin, whose decisions have been based upon the authority of the earlier decisions of some of the older states, which have since abandoned the ground, may also be expected to change." See, also, *May v. Bradlee*, 127 Mass. 414; *Com. v. Sturivant*, 117 Mass. 122.

and they indicate the opinion of the writers that the alleged testator was a rational person, and capable of doing acts of ordinary business. But it is perfectly clear that, in this case, an opinion not given upon oath in a judicial inquiry between parties is no evidence; for the question is, not what the capacity of the testator was reputed to be, but what it really was in point of fact; and, though the opinion of a witness upon oath as to that fact might be asked, it would be only a compendious mode of ascertaining the result of the actual observation of the witness, from acts done, as to the habits and demeanor of the deceased." *Id.* 735.

One other assignment of error remains to be considered. It relates to the admissions of the statements made by two witnesses of what passed between each other on the occasion of their seeing and conversing with the deceased, within an hour or two before he shot himself. They detailed what passed between them and the deceased, describing the latter's appearance and condition as indicating, in their judgment, that he was not in his right mind. As he left the presence of these witnesses, one of them re-

marked to the other that "Pitkin is not himself; George looks kind of crazy." The other, in response, expressed substantially, though in different language, his concurrence in that opinion. To the admission of this brief conversation between the witnesses, on the occasion referred to, the defendant objected, but the objection was overruled, and an exception taken. We do not think there was in this any error to the prejudice of the substantial rights of the company. The witnesses, when under oath, expressed the same opinion as to the condition of the deceased. What passed between them at the time to which their testimony referred was a part of what occurred on the occasion when they saw the deceased, and may well have been repeated to the jury, as showing that their opinion as to the mental condition of the deceased was not then presently formed, but was one formed at the very moment they saw him, within a very few hours before his death.

Upon the whole case we perceive no error in the proceedings of which plaintiff in error may complain, and the judgment is affirmed.

WILLIAMS v. SPENCER et al.

(23 N. E. 105, 150 Mass. 346.)

Supreme Judicial Court of Massachusetts.
Worcester. Jan. 1, 1890.

Exceptions from supreme judicial court, Worcester county; CHARLES DEVENS, Judge.

An appeal from the decree of the probate court for Worcester county, admitting to probate the will of Polly Crosby, and appointing petitioner administrator. The will was made on March 25, 1885. An issue was submitted to the jury whether testatrix was sane when the will was made. Appellants proposed to ask one of the attesting witnesses what his present opinion was as to the soundness of testatrix's mind at the time of the execution of the will. The witness having testified that he formed no opinion on the subject at the time he witnessed the will, but had an opinion at the time of the trial, which had been formed, in part, from what he had seen and heard since, and in part from what he saw at the time, the question was excluded, and the appellants excepted. Petitioner called one Upham, at whose house testatrix visited from April 20, 1885, till August 22, 1885, who testified in chief that he saw testatrix a few times after her husband died, November, 1884, and that while she was at his house he never saw any change in her intelligence, coherence of speech, or memory, and gave accounts of several conversations and acts tending to show soundness of mind. To impeach his evidence appellants offered evidence tending to show that since testatrix's death the witness had declared that he had never seen her, since her husband died, when she was fit to make a will. The evidence was excluded, and the appellants excepted. The jury answered the issue in favor of the sanity of the testatrix.

F. P. Goulding and J. M. Cochran, for appellants. *W. S. B. Hopkins*, for appellee.

KNOWLTON, J. How far the opinion of witnesses as to the mental condition of a testator may be received in evidence in proceedings to establish the validity of a will is a question about which there is a great conflict of authority. In this commonwealth, and in the courts of common law in England, and in many of the states of this country, it is held that an ordinary witness cannot give a mere opinion, whatever opportunities of observation he may have had. On the other hand, in the ecclesiastical courts of England, and in many courts in the United States, all witnesses have been permitted to give, not only facts upon which an opinion may properly be formed, but their opinions founded on those facts. It is universally held that an attesting witness may give his opinion, formed at the time, as to the sanity or insanity of the testator when the will was executed. In those courts where opinions are admitted on the ground that conclusions in regard to the mental condition of another, formed by one who has had an opportunity of observing him, are in themselves valuable and unobjectionable as evidence, there may

be good reasons for holding that the final opinion of the witness at the time of the trial should be received. But where a different doctrine is held the opinions of attesting witnesses to a will stand upon a peculiar ground. The witnesses are chosen by the testator, and are thereby, under the law, charged with an important duty in relation to the execution and proof of the will. It may be presumed that, in the performance of that duty, they will observe carefully the appearance of the testator at the time, and form an opinion as to his sanity. That opinion naturally and properly may determine their action in signing or refusing to sign as witnesses. It is regarded as a fact of some significance, which enters into the transaction, and which the court should be permitted to know and consider, like any other fact touching the execution of the instrument. Upon this theory, the opinion of an attesting witness, formed at another time, before or after the execution of the will, should stand like that of any other witness. It might be competent, in cross-examination, to affect the value of his testimony as to his conclusion at the time of attestation, but it could not be received on account of the value to be attached to it as a mere opinion. In *Poole v. Richardson*, 3 Mass. 330, the court permitted the witnesses to give "the judgment they formed of the soundness of the testator's mind at the time of executing the will." In *Robinson v. Adams*, 62 Me. 369, 409, referring to the time of execution of a will, the court say: "It is the opinion then formed that is admissible." In *Clapp v. Fullerton*, 34 N. Y. 190, it is said of the facts testified to by the witnesses, which occurred at the time of attesting, that "it is legitimate to give them such additional weight as may be derived from the conviction they produced at the time." *Jarman* states the rule to be that "subscribing witnesses are permitted to testify as to the opinion they form of the testator's capacity at the time of executing his will." 1 *Jarm. Wills*, 74. *Redfield* says: "It is admitted in nearly all the cases that the subscribing witnesses to the will are competent to express an opinion of the testator's apparent sanity at the time of execution." 1 *Redf. Wills*, 140. The only case to which we have been referred which decides that a subscribing witness may give an opinion formed afterwards is *Runyan v. Price*, 15 Ohio St. 1; and in Ohio, all witnesses who have had an opportunity of observing a testator are permitted to give their opinions, founded on what they have seen. We are of opinion that, under the authorities in this commonwealth, the testimony of the attesting witness was rightly excluded.

Whether the declaration of the witness Upham, offered to contradict him, should have been received, depends upon whether it was inconsistent with his former testimony. If it be assumed that the expression, "fit to make a will," referred to the mental condition of the testatrix, and that it is generally known that a person of full age and sound mind is fit to make a will, and if we disregard the differences of opinion that may be presumed to exist as to what constitutes soundness of mind or fit-

ness to make a will, we cannot say that the declaration was contradictory to the previous testimony. It may or may not have been, according as the facts not reported were of one kind or of another.

The witness "gave accounts of several conversations and acts tending to show soundness of mind." That certain facts, indicating that the testatrix was of sound mind, could be shown by his testimony, did not necessarily imply that he believed her to be sane. We do not know the full significance of those acts and conversations, and other facts within his knowledge may have shown that she was insane. Upon this ground the case of *Hubbell v. Bissell*, 2 Allen, 196, is authority in favor of the ruling. Nor upon the facts reported can we say that his testimony that "he never saw any change in her intelligence, coherence of

speech, or memory," while she was at his house, after the death of her husband, proves that he believed her to be fit to make a will. So far as the bill of exceptions shows, and so far as we have information from any source, she may have been all her life of such mental capacity and condition as to make it doubtful whether she was ever of sound mind, and the witness may have always considered her unfit to make a will. The unreported facts of the case may have been such as to make the evidence competent. If the testimony had been received, and the appellee had excepted, we should have assumed, on this bill of exceptions, that they were. But against the excepting party, who must establish the error on which he relies, we must assume that they were not. Exceptions overruled.

LOUISVILLE, N. A. & C. R. CO. v. WOOD.

(14 N. E. 572, 113 Ind. 544.)

Supreme Court of Indiana. Dec. 21, 1887.

Appeal from circuit court, Washington county; T. S. Collins, Judge.

This was an action brought by Lizzie Wood against the Louisville, New Albany & Chicago Railroad Company for injuries caused by the negligence of a conductor on one of the company's trains. The plaintiff recovered judgment, and the defendant appealed.

Geo. W. Easley, Geo. W. Friedley, and W. H. Russell, for appellant. Voyles & Morris and John A. Zaring, for appellee.

ELLIOTT, J. The material facts stated in the appellee's complaint are these: On the twenty-first day of October, 1882, the appellee purchased a ticket, and entered one of the appellant's passenger trains. The ticket entitled her to a passage from Salem to Campbellsburg. At the place of her destination, the appellant failed and refused to stop the train a sufficient length of time to enable her to leave it; but, having stopped the train, the conductor who had charge thereof, "before the plaintiff had sufficient time to get safely off the cars, and while the plaintiff was standing on the platform of the cars, which point she had reached while the train was not in motion, signaled the train so soon as she (the plaintiff) had reached the platform, to move on. The engineer did obey the signal, and did start the train in motion before the plaintiff could get off, and while she was standing on the platform. After the engineer had started the train, the conductor willfully, carelessly, and improperly seized her, and, without any fault or negligence on her part whatever, wrenched her off the steps, and jerked her to the ground," causing her to sustain very great bodily injury.

We cannot perceive the slightest ground for the contention of counsel that the complaint is bad. The carrier clearly violated a legal duty in not stopping the train a sufficient length of time to permit the appellee to alight in safety. Railroad Co. v. Buck, 96 Ind. 346, Railroad Co. v. Carper, (May Term) 14 N. E. 352. The conductor in jerking the appellee from the train was guilty of a tort while engaged in the line of his duty, and the appellant is unquestionably liable for such a tort. This liability exists even though the tort was a negligent, and not a willful, one. Railroad Co. v. Jackson, 81 Ind. 19; Railroad Co. v. Kelly, 92 Ind. 371; Railway Co. v. Savage, 110 Ind. 156, 9 N. E. 85; Railroad Co. v. Carper, supra, and cases cited. Counsel say: "There is no averment that the plaintiff was invited or directed to alight at the point she did, so as to bring the case within Railroad Co. v. Farrell, 31 Ind. 408."

The halting of the train at the station to which the appellant undertook to carry the appellee was an implied invitation to alight; so that, even if the complaint proceeded on the theory that it is assumed by counsel it does, it would be good. The theory, however, on which it does proceed is that the conductor in charge of the train heedlessly and wrongfully pulled the appellee from it while it was in motion. The cases we have cited show beyond all controversy that the conductor in the management of the train, and in caring for passengers in entering and alighting from the train, is the representative of the company in whose service he is engaged, so that the complaint is good on the theory on which it does proceed. Undoubtedly, there must be, as counsel assert, a connection between the negligence and the injury (Pennsylvania Co. v. Hensil, 70 Ind. 569; Railway Co. v. Conn, 104 Ind. 64, 3 N. E. 636); but we think it too clear to require discussion that the complaint does show that the tort of the conductor caused the appellee's injury.

It is said by counsel: "While the carrier is responsible for negligence willfully or carelessly inflicted upon passengers by servants employed in the performance of duties within the general scope of their employment, the question in such cases is whether the servant, when he inflicted the injury, was acting within the line of his employment; not whether the particular act was authorized or not. Railroad Co. v. Kelly, 92 Ind. 371." We fully assent to the rule as counsel state it, but we cannot agree that they give it a correct application. We have already shown that the conductor's act was within the scope of his employment, so that the rule which counsel invoke is decisively against them. It is also said by counsel that "the case of Railroad Co. v. Jackson, 81 Ind. 20, in its dictum, goes too far;" but counsel are in error, for that case states the rule as counsel concede it, and is abundantly supported by authority. Railway Co. v. Savage, supra.

It is further contended that, as the complaint does not directly allege that the conductor was acting within the scope of his employment, the complaint is bad, and we are referred to the case of Helfrich v. Williams, 84 Ind. 553. The plain answer to this is that the facts stated do show that the conductor was acting within the line of his duty when he pulled the passenger from the train, instead of affording her an opportunity to safely alight, as it was his duty to do.

The morning after the injury occurred, Dr. Rife was called to give the appellee medical attention, and he testified that she told him "what her trouble was." This testimony was competent. In order to enable a physician to intelligently prescribe or advise, he must be informed of the pains suffered by his patient, and where they are

located. To this effect the authorities uniformly go. *Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364, and cases cited; *Railroad Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, and cases cited; *Railway Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, and 4 N. E. 908. All that the appellee testified that she told her physician was what her pains were, and in what part of her body they were located. Counsel are mistaken in asserting that Dr. Rife was not called as a physician, for he was called in that capacity, and in that capacity prescribed for the appellee.

The appellee, while on the witness stand giving testimony, was allowed to remove a shawl from her feet and exhibit them to the jury. There was no error in permitting this to be done. The text writers and the decisions all agree that such an exhibition is not improper. Dr. Wharton says: "Injury to the person may also be proved by inspection. Thus, in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial." Whart. Cr. Ev. § 312. Mr. Best, speaking of this species of evidence, denominates it "real evidence," and says: "Immediate evidence is where the thing which is the source of the evidence is present to the senses of the tribunal. This is of all proof the most satisfactory and convincing." 1 Best, Ev. (Morgan's Ed.) 307. The old writers often speak of such evidence, and in *Hale*, P. C. 633, a notable instance is given of its force. Mr. Taylor collects a number of cases, affirms that the species of evidence here under discussion is always competent, and assigns to it the highest rank. 1 Tayl. Ev. § 512. An American author, discussing the subject, says: "The injured member may be exhibited to the jury." Abb. Tr. Ev. 599. In a recent article by Judge Thompson, entitled "Trial by Inspection," many cases are collected, all holding that exhibitions of persons or things are proper. 25 Cent. Law J. 3. Henry Wade Rogers, in an article entitled "Profert of the Person," also discusses the subject, and collects many authorities, all agreeing that exhibitions of injuries are not improper. 15 Cent. Law J. 2. Cases on the general subject are also collected in *Thurman v. Bertram*, 20 Alb. Law J. 151. In *Osborne v. City*, 32 Fed. 36, it was held not error for a surgeon to thrust a pin into the side of a person, alleged to be paralyzed, in the presence of the jury. Without further comment, we refer to other cases which are directly in point: *Schroeder v. Railroad Co.*, 47 Iowa, 375; *Mulhado v. Railroad Co.*, 30 N. Y. 370, and note; *State v. Wieners*, 66 Mo. 29. The principle has been asserted in many cases by this court. *Car Co. v. Parker*, 100 Ind. 181; *Story v. State*, 99 Ind. 413; *McDonel v. State*, 90 Ind. 320; *Short v. State*, 63 Ind. 376; *Beavers v. State*, 58 Ind. 530. Counsel for the appellant, although they argue the question at length, cite only a single case, that of *Ibinger v. State*, 53 Ind. 251; but, as

shown in *Car Co. v. Parker*, *supra*, that case is not in point, for the reason that the only question decided arose upon an instruction. More nearly in point are the cases of *Robinius v. State*, 63 Ind. 235; *Swigart v. State*, 64 Ind. 598; and *Bird v. State*, 104 Ind. 384, 3 N. E. 827,—but these cases form an exception to the general rule. In those cases, the question was whether the personal appearance of a party could be considered by a jury in determining a person's age, and it was held that it could not. These cases have been vigorously assailed by many writers and courts; but we do not feel it necessary to depart from them, for we think they are distinguishable from our other cases, as well as from the present case. As said of *Robinius v. State*, in one of our former cases: "There is a distinction between such a case and the present, for, where age is the material question, as it was in the case cited, the decision upon inspection really determines the whole question; while, in such a case as the present, the inspection of the wounded member simply illustrates and makes clear the testimony of the party, and assists in determining the character of one of the facts in the case." *Car Co. v. Parker*, *supra*. To what was there said we may add that here the exhibition of the injured member affects only the extent and character of the injury, which is only a single fact in the case; while, in a case where the decision depends upon the age of a party, the opinion of the jury upon inspection conclusively settles the whole question, thus effectually depriving the party aggrieved of the benefit of an appeal. But, in a case like this, the inspection of the injured part settles nothing more than the extent and character of the injury, if, indeed, it can be justly said to settle so much. At most, then, an inspection of an injured limb does no more than supply evidence upon a single fact, and it does not deprive the party of any substantial right on appeal; for it is conclusively settled that the appellate court will not weigh the evidence in any case where there is a conflict. It is obvious, therefore, that the case under discussion is very different from one in which age decisively determines the whole controversy. It is evident that the learned counsel have expended much labor on this point, and, as they cite only the single case we have referred to, we may well infer that there are no others that lend any support to their position. We have ourselves given the subject very careful study, and our search has not revealed a solitary authority that opposes, directly or indirectly, the doctrine that it is competent to exhibit an injured limb to the jury. It certainly has always been the practice, as Mr. Chitty says, to exhibit models, articles of apparel, or other chattels; and the case before us is the same in principle.

Miss Drumond testified that she was acquainted with the appellee; described her

personal appearance and physical condition previous to her injury. She also described the appellee's condition immediately after the accident, and for a few days afterwards. After she had testified to these facts, she stated that she saw the appellee a month afterwards; that she (the appellee) had grown worse, and the witness described her condition as it then existed. If this case was one requiring a non-expert witness to state facts before expressing an opinion, we should have no hesitation in holding that the facts stated were sufficient to entitle the witness to express an opinion. But we do not understand that upon such a question a knowledge of facts is required to be stated in advance, or that the witness must be an expert. *Turnpike Co. v. Andrews*, supra. In *Hardy v. Merrill*, 56 N. H. 227, a very learned opinion was delivered, in which very many decisions of the English and American courts were cited; and it was said, among other things, that "all concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. There are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health." Dr. Wharton lays down a like rule, and cites many authorities. 1 Whart. Ev. § 513. Other text writers assert the same rule. Rog. Exp. Test. § 3; Lawson, Exp. Ev. 470. Counsel cite upon this point two cases. The first of these (*Com. v. Sturdivant*, 117 Mass. 122) bears upon the question here under discussion, inasmuch as it decides that, (1) where the trial court adjudges that a witness is qualified to give an opinion, the appellate court cannot review the decision; (2) that it is competent for a witness to give an opinion as to the health of a party; and (3) that it is not improper to call upon him to describe specifically the matter of which he speaks. In discussing the second of these propositions, the court, after stating the general rule that non-expert witnesses may express opinions in many cases, says: "It is competent for a witness to testify to the condition of health of a person; that he is ill or disabled, or has a fever, or is destitute, or in need of relief. *Parker v. Steamboat Co.*, 109 Mass. 449; *Wilkinson v. Moseley*, 30 Ala. 562; *Barker v. Coleman*, 35 Ala. 221; *Autauga Co. v. Davis*, 32 Ala. 703." As we read the case cited, it lends counsel no support whatever, but, on the contrary, is strongly against them. The court fully adopts the view expressed in *Steamboat v. Logan*, 18 Ohio, 378, that, "it is not true, as a legal proposition, that no one but an expert can give an opinion to a jury." The second of the cases cited (*Reid v. Insurance Co.*, 58 Mo. 425) is not well considered, as there is neither argument nor authority adduced. The witness in that case was asked as to whether the assured was in

good health, and the court simply held that the question was incompetent; saying that "the question involved a mere conclusion, and was objectionable." This is not the law, for every answer of a witness to such a question is necessarily a conclusion, and yet, as we have seen, it is well settled that such a conclusion is competent. *Turnpike Co. v. Andrews*. It is said, however, that the evidence should have been excluded, because it permitted the witness to institute a comparison. There is no strength in this position. The testimony of the witness was directed to the condition of the appellee a month subsequent to her injury, and, after fully describing it, the witness said that it was worse than it was immediately after the accident. In determining whether an injured person is growing better or worse, a non-expert witness must necessarily express an opinion, for, as the cases we have cited hold, the fact is one that cannot be described by any other than an expert witness. Any witness of ordinary intelligence may be able to state that a sick or wounded person has grown worse, or has improved, without being able to give an accurate description of his condition, and this brings the case fully within the authorities. Undoubtedly, the facts on which the conclusion rests may be asked for on cross-examination; but the opinion is not incompetent merely because the witness cannot adequately state the grounds on which it rests, although the failure to do so may, perhaps, weaken its probative force. But in this case the facts were as fully stated as any non-expert could possibly state them; so that, even if we were wrong in relying on the authorities we have cited, the appellant cannot prevail, for the case is fully within the rule that, where a non-expert witness states facts on which his opinion is based, the opinion is competent.

One of the medical witnesses who had seen and examined the appellee, and who had described her condition, was asked: "What, in your opinion as a medical expert, produced the symptoms you saw in her case?" There was no error in permitting this question to be asked and answered. *Railway Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, and 4 N. E. 908, and authorities cited. *Railway Co. v. Savage*, supra. If it were conceded that *Van Deusen v. Newcomer*, 40 Mich. 120, does decide what the appellant claims, and that it is sound, it would not avail the appellant, for here the medical expert did detail the facts within his knowledge to the jury. *Haggerty v. Brooklyn*, 61 N. Y. 624, cited by appellant, simply decides that it was not competent to ask a non-expert witness "if the conductor did all in his power to avoid an accident."

A long hypothetical question was asked Dr. C. W. Murphy, and it is objected that it did not embrace all the evidence in the case. It is settled beyond controversy that a party who propounds a hypothetical question may

[assume such facts within the range of the evidence as he believes the evidence tends to establish. *Railway Co. v. Falvey*, 104 Ind. 412, 3 N. E. 389, and 4 N. E. 908, and authorities cited; *Goodwin v. State*, 96 Ind. 550, and authorities cited; *Elliott v. Russell*, 92 Ind. 526; *Guetig v. State*, 66 Ind. 94. Mr. Rogers, in discussing this question, says: "If framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them; it not being essential that he should state the facts as they actually exist." Exp. Test. 39. Another author says: "It is the privilege of counsel in such cases to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of the expert upon the facts assumed." Lawson, Exp. Ev. 153. Counsel say: "The hypothesis should include the substance of all the evidence." In support of this proposition, they refer us to *Com. v. Rogers*, 7 Metc. (Mass.) 500, and *People v. Lake*, 12 N. Y. 362. Neither of these cases supports the proposition. The New York cases are fully and strongly against the doctrine of counsel. *Stearns v. Field*, 90 N. Y. 640; *Mercer v. Vose*, 67 N. Y. 56; *Harnett v. Garvey*, 66 N. Y. 641. It is evident that the proposition cannot be sound. If it be regarded as correct, then, in every case, the court must determine what facts were or were not proved, and this would be an usurpation of the functions of the jury. If, as happens in most cases, the evidence is conflicting, then, if counsel are right, the assumption must of necessity contain contradictory statements. These reasons are in themselves enough to condemn the proposition of counsel, even in the absence of authority; but all the authorities are against them, so that the overthrow of their position is decisive and complete.

Dr. Neal, a medical expert, was permitted to testify that the irritation of the mouth of the urethra produced the contracted condition of the appellee's legs. What we have said in considering the testimony of another medical witness disposes of this point. It is, however, said that the question which drew out the testimony was leading. If it were granted that the question was leading, it would not entitle the appellant to a reversal. It is generally held that permitting a leading question to be asked will not be sufficient cause for reversal, although some of the cases hold that, where there is a clear abuse of discretion, the rule is otherwise. We need not decide which line of cases "hath the better reason;" it is enough for us to decide, as we do, that there was no such abuse of discretion as would require a reversal, even if we accepted the latter line of cases as correctly expressing the rule.

Counsel say: "The twelfth and thirteenth causes assigned in the motion for a new trial were intended to bring before the jury the accepted views of medical writers and

practitioners as to what was commonly understood by and known to the medical profession, that the condition of the lower limbs of the plaintiff is frequently produced by uterine trouble. If this was the fact, the defendant had a clear right to have it in proof before the jury. If it was an unusual fact, it would have made against the defendant; but if it were usual, and was commonly understood by medical authors and practitioners, it would have much weight in favor of the defendant. There can be no just reason assigned for excluding evidence as to what is commonly understood and known by the medical profession in that regard." We have copied all that is said by counsel upon this subject, and we are by no means convinced that the trial court erred. If the question had arisen on cross-examination, a different rule would perhaps obtain; but the witness was introduced by appellant and his opinion elicited. The qualification of the witness was thus asserted, and it was not necessary for the appellant to go further than to show the knowledge and experience of the witness, while, on cross-examination, it would perhaps have been proper to test his knowledge and experience by a proper examination. If a witness should be permitted to state what "is commonly understood by the medical profession," a never-ending investigation would be opened, and a collateral matter presented that would, as the evidence before us makes apparent, lead to an almost endless conflict of opinion. There would be, at best, an intangible conflict of opinion, without any authoritative method of settling it. If the defendant were permitted to ask such a question, then the plaintiff would be entitled to meet it, so that the contest would fall upon the vague and uncertain subject of what professional men "commonly understood." What men commonly understand can be determined only by an inquiry into their mental processes, and such an inquiry ought not to be allowed upon a purely collateral question. A matter so vague and so intangible ought not to be made the subject of inquiry, unless it is directly in issue, as motive, intention, or the like.

Appellee's counsel asked on the cross-examination of Dr. Painter, one of the expert witnesses introduced by appellant, this question: "Suppose she received a shock upon her feet going a distance of four or five feet outward and some three feet downward, as much as two years and six months ago, how far would such a shock account for her present condition?" We have no doubt, although the question is somewhat confused, that the ruling of the trial court was right. The witness testified, in his evidence in chief, that he had examined the appellee, described her condition, and gave his opinion upon various phases of her case. It was therefore competent for the appellee to ask him for his opinion, not only for the

purpose of testing his ability as an expert, but also for the purpose of placing the opinion before the jury as sustaining her theory. *Railway Co. v. Falvey*, supra, and cases cited; *Rog. Exp. Test.* 50. It is a mistake to suppose that when counsel, in the examination in chief, open on a general subject, that the line of examination adopted must be followed by cross-examining counsel; on the contrary, it is well settled that, where the direct examination opens on a general subject, the cross-examination may go into any and all phases of that subject. *De Haven v. De Haven*, 77 Ind. 236; *Vogel v. Harris* (December 8, 1887), 14 N. E. 385. On a cross-examination, counsel may direct and separate, or unite and join, the facts involved in the general subject. The only restriction upon the right of cross-examination, so far as affects the question as it is here presented, is that it must be confined to the subject-matter of the examination in chief. As decided in *Higham v. Vanosdol*, 101 Ind. 162, a distinct and independent subject cannot be introduced on cross-examination, but the cross-examination may go to all matters involved in the subject embraced in the examination in chief.

It is said by counsel that "the eighteenth cause for a new trial raised the question whether Dr. E. P. Easley could answer certain questions from his opinions derived from medical books." We do not think that the record presents the question just as counsel state it. The witness was asked: "What effect would her [the plaintiff] living with a man who was a paralytic have upon her; how and in what way would it affect her?" To this he answered: "I can't say what effect it would have upon her. I could recite the reported cases. We know that persons have become paralytics simply by waiting on a paralytic." We incline to the opinion that it would not, in any event, be proper to recite special cases reported in medical books; but, however this may be, no offer of evidence was made, and no question is presented which will avail the appellant. In this instance, we may observe, the witness was permitted to give his opinion derived from the books, and the only effect of the ruling was to deny the right to give special cases reported in the works of medical writers. *Lawson, Exp. Ev.* 169, and cases cited.

The only argument made in support of one of the points stated by counsel is this: "The twenty-first, twenty-second, and twenty-third causes assigned for a new trial are good, under the rulings of the cases of *Strohm v. Railroad Co.*, 96 N. Y. 305, and *Curtis v. Railroad Co.*, 18 N. Y. 541." The questions asked the medical witnesses were as to the probable results that would follow from an injury described by the witnesses who testified on the trial. We understand it to be well settled that such questions are proper. *Lawson, Exp. Ev.* 108-114; *Rog.*

Exp. Test. 81-107. The cases cited by counsel are directly against them, for they both concede that it is competent to ask an opinion as to probable results, although it is held that merely speculative opinions are not competent. In the last of the cases cited it was said, in speaking of an instruction, that the true rule was, as laid down, that "the plaintiff could only recover damages for such pain and suffering as the evidence rendered reasonably certain would necessarily result from the injury."

One of the attorneys of appellant had made an affidavit in support of an unsuccessful motion for a continuance; and this, when offered in evidence, was excluded. Clearly, there was no error in this ruling.

Appellant offered to prove by the same attorney what the conductor who, as the evidence shows, pulled the appellee from the train, said as to attending the trial. There was no error in this ruling. What the witness proposed to state was mere hearsay, and its exclusion is sustained by one of the plainest rules of evidence. The appellant had a right, either by compulsory process or by deposition, to the testimony of the witness, but it had no right to have his statement rehearsed to the jury. We think appellant's counsel are in error in assuming, as they impliedly do, that Dr. Neal did not examine the appellee in a professional capacity, for the record shows, not only that he visited her in that capacity, but that he did so under the order of the court. It is well established by authority that statements made to a physician in his professional capacity are competent, when descriptive of existing symptoms or pains, although they are not admissible when mere narratives of past occurrences. *Railroad Co. v. Newell*, 104 Ind. 264, 3 N. E. 836; *Railroad Co. v. Falvey*, and cases cited; *Murphy v. Railroad Co.*, 66 Barb. 125; *Kent v. Lincoln*, 32 Vt. 591-597; *Barber v. Merriam*, 11 Allen, 322; *Looper v. Bell*, 1 Head, 373; *Hatch v. Fuller*, 131 Mass. 574; *Railroad Co. v. Johns*, 36 Kan. 769, 14 Pac. 237. In the case last cited, the authorities are collected and reviewed, and it was said: "But the mere fact that the declarations are made after suit has been commenced, and while it is pending, will not be sufficient to exclude the declarations, and they should be allowed to go to the jury." This is in accordance with our decisions, and with the decided weight of authority. Following *Quaife v. Railway Co.*, 48 Wis. 513, 4 N. W. 658, this court said, in speaking of declarations such as those here given in evidence: "They are especially competent, and of more weight, when made to a physician for the purpose of receiving treatment, or to a medical expert who makes an examination at the request of the opposite party, or by direction of a court, for the purpose of basing an opinion upon as to the physical situation of the party whose condition is the subject of in-

quity." *Railroad Co. v. Newell*, supra. As suggested in the case from which we have quoted, and in some of the Massachusetts cases, without some information as to the seat and character of pain, and as to the symptoms of the sick or injured person, it is impossible, in many cases, for a physician to form an intelligent opinion; for many of the organs of the human body are concealed from view. *Roosa v. Loan Co.*, 132 Mass. 439; *Bacon v. Charlton*, 7 Cush. 581; *Barber v. Merriam*, 11 Allen, 322. It results that, as said in *Railroad Co. v. Newell*, and other cases, the evidence is admitted on the ground of necessity. That this is true is obvious, since its denial would in many cases completely thwart justice. Another well settled legal principle supports the rule, and that is this: Where an act or transaction is competent, declarations forming part of the thing done are also competent.

Dr. Neal was asked "whether the condition of the womb in which you found it day before yesterday will account for the condition of the spine and its tenderness, as well as the drawn limbs, and all the conditions now." The objection to this question is that the witness had not stated the facts to the jury. We think it only necessary to say, on this point, that counsel's position rests on an erroneous assumption. We think the facts relevant to the opinion were fully in evidence. Indeed, the question itself directs the attention of the witness to a fact that must have come under his own observation, and, of necessity, involved in the matter on which his opinion was asked.

We set out the instructions given at the request of the appellee, as they contain the strongest expression of the law against the appellant found in the series. These are the instructions: "(1) If the plaintiff was a passenger upon defendant's road in one of defendant's coaches, as charged in her complaint, the defendant's obligation was to carry her safely and properly; and, if the defendant intrusted this duty to the servants of the company, the law holds the defendant responsible for the manner in which they execute it. The carrier is obliged to protect its passengers from improper and unnecessary violence at the hands of its own servants. And it is the established law that a carrier is responsible for the negligence and wrongful conduct of its servants, suffered or done in the line of their employment whereby a passenger is injured. (2) The duty of a carrier is to safely carry passengers. It is true that a carrier of passengers is not an insurer of the safety of those whom it undertakes to carry, against all the risks of travel; but nevertheless there rests upon such carrier this general duty of safely carrying. (3) A carrier of passengers for pay is responsible for injuries sustained by a passenger through the neglect, recklessness, and carelessness of the servants of such carrier, while such servants are engaged in the gen-

eral scope of their employment, whether the act was or was not authorized by the master. (4) A passenger is warranted in obeying the direction of the servants and agents of the carrier, when given within the scope of their duty, unless such obedience leads to a known peril which a prudent person would not encounter. (5) If, in this case, the jury believe, from a fair preponderance of the evidence, that the plaintiff obeyed the defendant's conductor, in charge of the train upon which she was a passenger, in getting off of the train, and if she was not then apprised of any peril that she would encounter thereby, she would not be guilty of contributing to any injuries received by her in thus alighting from the train. (6) If the fact be that the defendant's conductor, having charge of the train upon which plaintiff was a passenger, seized hold of her while the train was in motion and was moving on, and pulled her from the platform of the coach by the exercise of physical force, and thereby caused her to strike the ground or other hard substance below, whereby she was injured, she would not be guilty of contributing to injuries received thereby. (7) If plaintiff did not receive the injuries complained of by any contributing act of negligence or fault of her own, but was injured at the time complained of by the carelessness and negligence or fault of the defendant's servants, or one of them, committed in the general scope of employment as such servants or servant, the defendant is liable for such damages as she may have sustained by the injuries thus received. (8) If you find for the plaintiff, you are instructed that, in assessing plaintiff's damages, you cannot exceed the sum sued for in the complaint, which is twenty-five thousand dollars; and, in assessing the damages, it is proper that you consider the injuries received by plaintiff, their extent, whether of a temporary or permanent character, and you may take into consideration loss of time, expenses incurred, physical suffering, bodily pain, and permanent disability, if proved to be direct results of the injuries described in the complaint, and you should thereupon assess such compensatory damages as in your opinion the evidence before you warrants. (9) A railroad company carrying passengers for hire has not discharged its duty, or relieved itself from liability, to them, till it stopped at the end of their journey a reasonable time for them to get off the train in safety."

In our judgment, these instructions state the law quite as favorably to the appellant as it had a right to ask. If there is error in them it is against the appellee. It is said by counsel that the first and second instructions given for the plaintiff are mere abstract propositions. We, however, regard them as correct statements of the law, well applied to the particular case. The fourth and fifth instructions are correct in their statement of legal principles. *Railroad Co.*

v. Carper (this term) 14 N. E. 352; Railway Co. v. Pinchin (this term) 13 N. E. 677. We do not, in this holding, controvert the doctrine that a passenger must not obey the directions of the employés where it will lead to known danger which a prudent person would not encounter. On the contrary, we approve these instructions, because they assert that doctrine. We cannot hold that the instructions are not relevant to the evidence; nor can we hold that they are not within the issue tendered by the complaint. The use of the epithet "willful" does not control the other averments. We think it must be regarded as conclusively settled by our cases that the use of the words "willful" or "willful negligence" does not change the character of the pleading. As a matter of pleading, epithets are of no great force. *Palmer v. Railroad Co.* (this term) 14 N. E. 70; *Gregory v. Railroad Co.* (Ind. Sup.) 14 N. E. 228; *Railway Co. v. Ader*, 110 Ind. 376, 11 N. E. 437; *Railway Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Railroad Co. v. Mann*, 107 Ind. 89, 7 N. E. 893; *Railway Co. v. Schmidt*, 106 Ind. 73, 5 N. E. 684. It is alleged in the complaint, among other things, that "the plaintiff sustained said injuries without any fault on her part, and that the same were received by her because of the negligent, careless, willful, heedless, and improvident acts of said conductor." This, taken in connection with other averments, makes the cause of action one of negligence, rather than of intentional and malicious wrong. What the conductor did, although constituting a tort, did not, upon the theory of the complaint, constitute a willful and intentional assault. It is evident that the theory on which the complaint proceeds is that the wrong was not an intentional or malicious one, for it is alleged that it was heedless and negligent, and that there was no contributory negligence on the part of the plaintiff. The court below construed the complaint as we construe it, and so, also, did the appellant, as appears from the instructions given at its request; the first of which reads thus: "(1) The jury are instructed that this is an action on the part of the plaintiff to recover damages against the defendant for injuries alleged to have been sustained by the plaintiff on the night of the twenty-first day of October, 1882, in getting off of the steps of a car of one of defendant's passenger trains at Campbellsburg; the plaintiff alleging that 'the conductor of said train negligently, heedlessly, willfully, carelessly, and improperly seized her while said train was in motion, and, without any fault or negligence of the plaintiff whatever, he wrenched her off of said steps, and jerked her to the ground, where she alighted in a twisted posture,' thereby injuring her feet, legs, and body generally, and causing a concussion of the spine, resulting in paralysis of the lower limbs, rendering her unable to walk, and that such in-

juries are permanent. The answer of the defendant is a general denial, which casts upon the plaintiff the burden of proving—First, that she was wrenched off of the steps of said car, and jerked to the ground, by the conductor; second, that the injuries alleged by the plaintiff were the direct and immediate consequences of the manner in which she was taken off the train; and, third, that the plaintiff did not, by any act or conduct of hers at the time, contribute to the injury, and that she was free from fault or negligence on her part." The doctrine in *Carver v. Carver*, 97 Ind. 497-516, applies here with peculiar force: "When a theory is thus adopted, and acted upon below, with the concurrence of both parties, a judgment ought not to be reversed because the court instructs the jury in accordance with it."

The only objection urged against the instructions given by the court on its own motion, not disposed of by what we have already said, is that they direct the jury to find a general verdict, and thus impliedly instructed them not to return a special verdict. A number of interrogatories were submitted by the parties and the court; and we are inclined to the opinion that the fair meaning of the instruction on this point is that, in case answers were returned to the interrogatories, there must also be a general verdict. If this be true, there was no error; but if we are wrong in this, still there can be no reversal, for our statute provides that, "in all actions, the jury, unless otherwise directed by the court, may render a special or general verdict." Rev. St. § 546; *Work, Pr. § 849*. The court has authority to direct a general verdict, and we must presume that the authority was justly exercised; for, until the contrary appears, all reasonable inferences are indulged in favor of the rulings of the trial court.

Conceding that the fourth instruction asked by the appellant was correct, (a concession not warranted, as we incline to think,) it was substantially embodied in the third instruction given at appellant's request. It is too well settled to require the citation of authorities that a trial court is not bound to repeat its instructions. What we have said of the fourth instruction applies to the sixth, seventh, and eighth instructions asked by the appellant, for, so far as they were correct, they were substantially included in other instructions given. The tenth instruction does not express the law, and was rightfully refused. It is not necessary that the wrongdoer should apprehend the particular consequences which may proximately result from his acts, although the act must be of such a nature as to produce some injurious result. To illustrate: A man ill with consumption, who is wrongfully injured in alighting from a train, and so injured as that a hemorrhage results, has a right to recover although the servants of the carrier may not have had reason to apprehend such a result. *Railroad*

Co. v. Riley, 39 Ind. 568. In no case is it necessary that the particular result which follows should be anticipated. Certainly, no man who strikes a feeble person and injures him can be heard to say that he did not anticipate that it would hurt him more than it would have done a robust man. Where a tort is committed from which injury may reasonably be anticipated, the wrong-doer is liable for the proximate results of that injury, although the injury extends further than it would have done had the injured person been in perfect health. It is the general character of the act, and not the particular result, that the law regards. It is true that the act which causes the injury must be a negligent one, and this it cannot be unless the facts show that it was one which ordinary care would have enabled the person who does it to foresee and provide against. *Railway Co. v. Locke* (this term) 14 N. E. 391. There is a plain difference between the wrongful act and its consequences; for, when a wrongful act is done, the wrong-doer must answer for all proximate consequences, although he may not have foreseen or anticipated the particular form or character of the resulting injury. The doctrine which the authorities lay down is thus stated in *Hill v. Winsor*, 118 Mass. 251: "The accident must be caused by the negligent act of the defendants, but it is not necessary that the consequences of the negligent act should be foreseen by the defendants. It is not necessary that either the plaintiff or the defendants should be able to foresee the consequences of the negligence of the defendants, in order to make the defendants liable. It may be a negligent act of mine in leaving something in the highway. It may cause a man to fall and break his leg or arm, and I may not be able to foresee the one or the other." In another case it was said: "It is not necessary that injury in the precise form in which it in fact resulted should have been foreseen." *Lane v. Atlantic Works*, 111 Mass. 136. In *Newell v. Whitcher*, 53 Vt. 589, the court was asked to charge the jury "that, if the defendant's acts and conduct would not have injured a person of ordinary nerve and courage, then there can be no recovery;" and it was held that this instruction was properly refused. But we cannot add to the length of our already very lengthy opinion by commenting upon the authorities. We refer, without discussion, to some of the many decided cases: *Railroad Co. v. Riley*, supra; *Railroad Co. v. Buck*, 96 Ind. 346; *Railway Co. v. Falvey*, supra; *Railway Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *Railroad Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, and cases cited page 188, 109 Ind., and pages 310 and 70 of 6 and 10 N. E.; *Stewart v. City*, 38 Wis. 584; *Oliver v. Town*, 36 Wis. 592; *Kellogg v. Railway Co.*, 26 Wis. 233; *McNamara v. Village*, 62 Wis. 207, 22 N. W. 472; *Brown v. Railway Co.*, 54 Wis. 342, 11 N. W. 356; *Williams v. Vanderbilt*, 28 N. Y. 217;

Ehrgott v. Mayor, 96 N. Y. 264; *Beauchamp v. Mining Co.*, 50 Mich. 163, 15 N. W. 65; *Barbee v. Reese*, 60 Miss. 906; *Railway Co. v. Kemp*, 61 Md. 74; *Fitzpatrick v. Railway Co.*, 12 U. C. Q. B. 645. "The general rule," says an eminent court, "is that, in actions of tort like the present, the wrong-doer is liable for all the direct injury resulting from his wrongful act; and that, too, although the extent or special nature of the injury could not, with certainty, have been foreseen or contemplated as the probable result of the act done." *Railway Co. v. Kemp*, supra. A late writer collects many cases, and lays down the rule, in very strong terms, as we have declared it. 2 Wood, Ry. Law, 1232. We conclude that, both upon principle and authority, an injured person may recover compensatory damages for injuries sustained, although the wrong-doer did not know, or could not foresee, that the special or particular injury would be greater to the person upon whom the wrong was actually inflicted than to one in full strength and robust health. A person, feeble or strong, young or old, is entitled to recover full compensation for the injury actually sustained by the acts of a wrong-doer.

In instructions given at the request of the appellant, the court asserted in express terms, and, probably, in stronger language than the law warrants, that the plaintiff could not recover if the injuries resulted from disease, and not from the negligence of the defendant, and it was unnecessary to repeat these instructions. Two of these instructions read thus: "(7) By direct and immediate cause and proximate cause, as used in all the instructions in this case, is meant such cause or causes as are usually and ordinarily followed by the result attributed to the act or acts, and such as a person of ordinary experience and judgment could reasonably apprehend would follow as the direct effect of the act or acts charged as being the cause of the injury." "(13) If the jury believe from the evidence that the plaintiff's injured and diseased condition is due to chronic womb disease, and other ailments existing prior to the twenty-first of October, 1882, and not the direct and immediate result of the manner in which she was assisted from the car-steps, then the verdict of the jury must be for the defendant." It may be that the appellee can justly complain of these instructions, but certainly the appellant cannot.

The instruction asked after the argument was closed was properly refused. A party has no right to demand an instruction at so late a period in the trial.

Seventy-five interrogatories were submitted by the appellant, and the court refused to send 60 of them to the jury, but did send 15 of them, and did also prepare and submit other interrogatories to the jury. We perceive no error in the ruling of the court on this subject. All of the rejected interrogatories, except, perhaps, the sixty-fifth, are

open to the objection that they ask for evidence, and not facts. There is everywhere in jurisprudence an important difference between evidence and facts, and in no branch of jurisprudence is it more important than in that which governs the verdicts and findings of juries. It would lead to most evil consequences to permit a party to compel the jury to rehearse mere items of evidence. But it is needless to discuss the question; our statute and our decisions forbid the practice here defended by the appellant. We cannot examine the interrogatories in detail; it is enough to say that if there was error at all in the ruling of the court, as we think there was, it was in giving some of the interrogatories submitted by the party who now complains. The 19 interrogatories submitted included 15 of those asked by appellant, and certainly were as many as it was proper to submit; they were, indeed, more than the case required.

There is evidence very satisfactorily proving that prior to the accident Mrs. Woods was a strong and healthy woman about 40 years of age. It is further shown that her husband was a paralytic, and that she did the household work of a woman, and the work of a man in managing the business affairs of a farm. The evidence also shows that prior to the accident she did a farmer's hard work; such as hauling wood, making hay, and the like. Since the accident she has been physically almost helpless, and is unable to do any work. Her injuries are of a permanent nature, and, from the evidence, the fair inference is that she will probably grow worse. She has suffered much, and, it is reasonably certain, will suffer more as the

years go by. Her vision is affected, her hands and legs are partially, if not totally paralyzed, and there is some curvature of the spine. It is very apparent, therefore, that there is evidence fully warranting the inference that the appellee is a physical wreck, and, indeed, the evidence fairly justifies the inference that her mental powers are seriously impaired. We cannot, under the circumstances, declare that the damages are the result of passion, prejudice, or corruption, and it is only where this can be justly asserted that a verdict can be set aside. *Hoagland v. Moore*, 2 Blackf. 167; *Guard v. Risk*, 11 Ind. 156; *Yater v. Mullen*, 23 Ind. 562; *Alexander v. Thomas*, 25 Ind. 268; *Reeves v. State*, 37 Ind. 441; *Railway Co. v. Collarn*, 73 Ind. 261; *Railway Co. v. Fix*, 88 Ind. 381; *Car Co. v. Parker*, 100 Ind. 181; *Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364; *Railway Co. v. Falvey*, *supra*; *Railroad Co. v. Holland*, 18 Ill. App. 418; *Groves v. Rochester*, 39 Hun, 5; *Osborne v. City*, 32 Fed. 36.

It is alleged as a cause for a new trial that some of the jurors were guilty of misconduct. The evidence upon this point very fully and satisfactorily supports the finding of the court, and we cannot interfere. It has long been the rule in this, as in other appellate courts, that, where a question of fact is decided by the trial court, it will not be disturbed if there is evidence fairly sustaining it. *Pedigo v. Grimes* (May term) 13 N. E. 700, and authorities cited.

We have thus, with patience and care, examined all the questions properly saved, and, as we are not able to find any error, we must affirm the judgment.

CITY OF BLOOMINGTON v. SHROCK.

(110 Ill. 219.)

Supreme Court of Illinois. June 11, 1884.

Appeal from appellate court, Third district.

John T. Lillard, for appellant. Fifer & Phillips, for appellee.

SCHOLFIELD, J. This was an action on the case for negligence, by appellee against appellant. Appellee, a married woman, was violently thrown down while walking along a sidewalk adjacent to one of appellant's streets, by reason of a defect in the sidewalk, and thereby received injuries which she claimed resulted in causing her to have an abortion. It was contended by appellant upon the trial that she was guilty of such contributory negligence as to bar her right to recover, in omitting proper care and caution to avoid the abortion; and this was the most important question upon the trial, although there were other questions of minor consideration contested.

Dr. Luce was called and examined as a witness on behalf of appellant, as an expert, and gave evidence tending to prove that appellee was guilty of negligence in the respect contended by appellant. He quoted from and made reference to no book, but upon his cross-examination counsel for appellee inquired of him whether he was acquainted with "Playfair" and "Bedford" (treatises on midwifery), and, upon his responding in the affirmative, and that they were standard authorities on questions of this character, counsel proceeded to read at length from each of these authors, consecutively, and then inquired of the witness whether he agreed with the authors as to the parts so read. This was objected to by the counsel for appellant, but allowed by the court, and the witness was required to make answer.

The weight of current authority is decidedly against the admission of scientific books in evidence before a jury, although in some states they are admissible. 1 Greenl. Ev. § 440, and note; Whart. Ev. § 665; Rog. Exp. Test. §§ 168, 169, et seq., and cases cited in notes. And the weight of current authority is, also, against allowing such treatises to be read from, to contradict an expert, generally. See authorities supra, and Com. v. Sturtevant, 117 Mass. 122; Davis v. State, 38 Md. 15; State v. O'Brien, 7 R. I. 336. Where, however, an

expert assumes to base his opinion upon the work of a particular author, that work may be read in evidence to contradict him. This was, in effect, our ruling in Insurance Co. v. Ellis, 89 Ill. 516; and it was expressly so ruled in Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862; City of Ripon v. Bristol, 30 Wis. 614; and Huffman v. Click, 77 N. C. 55. See, also, Marshall v. Brown, 50 Mich. 148, 15 N. W. 55; Rog. Exp. Test. § 181.

But counsel for appellee insist the ruling of the court below is in exact conformity with the ruling of this court in Insurance Co. v. Ellis, supra. This is a misapprehension. In that case the witness stated "that he had read text books that he might be able to state why he diagnosed the case as delirium tremens"; and it was held "not unfair to the witness to call his attention to the definitions given in the books of that particular disease, and asking him whether he concurred in the definitions." And it was said: "That is, in no just sense, reading books to the jury as evidence, or for the purpose of contradicting the witness." The source of his professed knowledge was given, and it was allowed to show that he was mistaken, by resorting to that source. In the present case, it has been seen, the course pursued was entirely different. The witness based no opinion which he gave upon the authority of books, and they were only brought in to impair his evidence on cross-examination.

Where a witness says a thing or a theory is so because a book says so, and the book, on being produced, is discovered to say directly to the contrary, there is a direct contradiction which anybody can understand. But where a witness simply gives his opinion as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of theory; and any number of additional books expressing different theories would obviously be quite as competent as the first. But since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory.

We think the court erred in admitting this evidence, and for that error the judgment is reversed, and the cause remanded.

Judgment reversed.

SLOCOVICH et al. v. ORIENT MUT. INS. CO.

(14 N. E. 802, 108 N. Y. 56.)

Court of Appeals of New York. Jan. 17, 1888.

Action by George Slocovich and others against the Orient Mutual Insurance Company on a policy of marine insurance. Judgment was rendered for plaintiffs by the general term, and the defendant appeals.

Edward M. Shepard, for appellant. Sidney Chubb, for respondents.

EARL, J. This action was brought to recover on a policy of marine insurance issued by the defendant to insure a "port risk in the port of New York" upon the ship Zorka. The policy was in favor of the plaintiffs, under their firm name of Slocovich & Co., "on account of whom it may concern;" loss, if any, to be paid to them or order. The risks which, by the terms of the policy, the defendant assumed, were, among others, "perils of the seas, fires, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said vessel, or any part thereof." The ship was valued in the policy at the sum of \$16,000, and was insured for \$11,000. It was alleged in the complaint that after the issuing of the policy, and on or about the fifth day of April, 1883, the Zorka, while lying at anchor in the port of New York, was burned and partially destroyed by the perils insured against. The answer admitted the making of the policy, and that on the day named the ship was burned and partially destroyed by fire, but denied that the plaintiffs had an insurable interest in her to the amount of \$16,000, or, otherwise, that she was destroyed by perils insured against in the policy; and alleged by way of counter-claim that the valuation of \$16,000 was excessive to the plaintiffs' knowledge; that the ship was in fact worth not more than \$5,000; that she was by the plaintiffs valued at \$16,000 fraudulently, and to defraud and induce the defendant to accept such valuation and execute the policy, and that the defendant, relying on the accuracy of such valuation, made and delivered the policy, and that she was burned and destroyed by fire by and through the act and negligence of the plaintiffs, and by and with their knowledge, procurement, and assent; and judgment was demanded for the defendant that the complaint be dismissed, that the policy be adjudged and decreed void and of no effect, and that the same be delivered to defendant for cancellation. To the counter-claim the plaintiffs served a reply, denying the allegations thereof. At the trial the issues of fact litigated were as to the insurable interest of the plaintiffs in the vessel; as to the cause of the fire,—the claim on the part of the defendant being that the ship was set on fire by the captain, at the instigation of, and in collusion with, the plaintiffs; and as to

the value of the ship,—the claim of the defendant being that there was a fraudulent overvaluation. Upon these issues of fact there was sufficient evidence for the consideration of the jury; and their determination, having been satisfactory to and approved by the general term, concludes us. We deem it important now simply to notice a few of the principal errors relied upon for a reversal of the judgment.

1. As above stated, there was an issue upon the trial as to the value of the vessel at the time of her insurance, and of her destruction soon thereafter by fire, and several experts were called and testified upon both sides as to her value, who varied widely in their judgments. Among the witnesses called on the part of the defendant was Francis A. Martin, who testified that he was a marine surveyor; that he had been engaged in that business altogether 25 years; that he had followed the sea six or seven years, and had been in command of a vessel; that his business had led him to be familiar with the market values of vessels in the port of New York for 10 years; that in his regular business he had been called upon to value vessels, principally by adjusters of averages; that he knew the ship Zorka, and had been on board of her a good many times, but not within five or six years. He stated, in answer to a question, that he thought he was able, from his experience and personal knowledge, and the personal examination he had made of her, to form an opinion as to her value in 1883. He was then asked this question: "What, in your judgment, judging from your personal knowledge of the vessel gathered from your personal observation, and your knowledge of the ordinary results of wear and tear in ordinary use, was the market value in the port of New York of the ship Zorka in the month of April, 1883?" This question was objected to by the plaintiffs, and excluded by the court, on the ground, as we must assume from the record, that the witness did not have sufficient knowledge of the vessel to testify as to her value at the time she was burned. It will be observed that the witness was asked for his judgment based solely upon his personal knowledge. It was for the trial judge to determine, in the first instance, whether the witness was competent as an expert to testify to the value of this vessel. He had not seen her for five or six years, and knew nothing about her condition at the time of her destruction. It did not appear what her condition was at the time he last saw her; and it appeared that, subsequently to that time, and after the year 1880, the plaintiffs had expended at least \$7,000 in repairing her. Under such circumstances, we cannot say that the judge committed any error in excluding the testimony. If the evidence had been received it certainly would not have been entitled to very much weight with the jury. While it would not, we think, have been er-

roneous to receive and submit the evidence to the jury for what it was worth, we cannot say, as matter of law, that the judge exceeded the bounds of a reasonable discretion in holding that the witness was not qualified as an expert to give an opinion as to the value of the ship at the time she was burned. The rules determining the subjects upon which experts may testify, and prescribing the qualifications of experts, are matters of law; but whether a witness offered as an expert has those qualifications is generally a question of fact to be decided by the trial judge; and it has been held that his decision in reference thereto is not reviewable in an appellate court. *Sarle v. Arnold*, 7 R. I. 582; *Dole v. Johnson*, 50 N. H. 455; *Jones v. Tucker*, 41 N. H. 546; *Wright v. Williams*, 47 Vt. 222. Without going the full length of these cases, it is sufficient to hold here that the decision of the trial judge in such a matter should not be held to present an error of law, and on that account be reversed, unless it is against the evidence, or wholly or mainly without support in the facts which appear. Here, we think, it was a fair matter for the judgment of the trial judge whether this witness had the requisite knowledge and qualifications to give an opinion as an expert as to the value of this ship. And hence we think that judgment is not the subject of review here.

2. The plaintiff called one Boyesen as a witness and examined him as an expert as to the value of the vessel. He testified that he had been a ship-broker and a ship-owner in the city of New York for ten years past, and for five years before that in London; that in 1883 he knew the fair market value of ships in the port of New York; that during the last 15 years he had bought and sold over 200 ships and steam-boats; that he had seen the *Zorka* once, and knew her from report,—from the books, the *American Lloyds*, the *Green Book*, and the *Record Book*; that those books were published in reference to the standing of all ships, giving their descriptions, and are used by the underwriters and merchants; that he never made any personal examination of the *Zorka*, but that his knowledge of her was substantially confined to the information he got from the general records used in his business and reports made therein, by which he was always guided in buying and selling ships. He was then asked this question: "Do you know what would be a fair market value in the port of New York during the months of March and April, 1883, of the *Zorka*?" The defendant objected to the question, on the ground that the witness had no personal knowledge of the vessel. The objection was overruled, and the witness answered, "Yes, I know." This was a mere preliminary question, and was of itself entirely harmless, and no error was committed by the court, in permitting it to be answered. Thereafter, without any fur-

ther objection, and apparently with the consent of the defendant, the witness was permitted to testify as to the market value of the vessel. But if it should be assumed that all the further evidence was subject to the same objection, we should still be of opinion that no error was committed in receiving it. It is true that the witness had no knowledge of this vessel, based upon any personal examination, and that, substantially, all his knowledge was derived from the reports, books, and records to which he referred. But there was evidence showing her age, tonnage, condition, and character. There was evidence, also, tending to show that those books and records contained a full and accurate description of her character, condition, age, tonnage, and the material of which she was made; and that they were commonly referred to by underwriters, merchants, and persons buying and selling ships, for the purpose of ascertaining the condition and description of the ships; and it is to be inferred that their standing in the market and among business men depends somewhat, if not largely, upon those records. They were regarded as sufficiently reliable for the guidance of underwriters, merchants, and buyers and sellers of ships; and they have been so frequently before the courts that we may take judicial notice of the fact that they are referred to by business men for the purpose of ascertaining the condition, capacity, age, and value of ships. It was not a sufficient objection to the competency of this witness that he had no personal knowledge of the ship. An expert is qualified to give evidence as to things which he has never seen. He may base an opinion upon facts proved by other witnesses, or upon facts assumed and embraced within the case. Questions may be put to him assuming the facts upon which he is asked to base his judgment and express an opinion. In this case, the question put to the witness might have assumed the age, tonnage, character, condition, and quality of the vessel, and he could have been asked to give an opinion as to her value based upon such facts; or the facts relating to the vessel appearing in the books and records which he referred to, and which were also proved upon the trial, might have been assumed in the question put to the witness, and he asked to give an opinion as to her value based upon them. The plaintiff was not asked to pursue this course in putting his question, and there was no objection that the witness did not have sufficient facts before him upon which to base his opinion as to the value of the ship. The sole objection was that he did not have personal knowledge of the vessel. It seems to have been assumed that the character, condition, and quality of the vessel were sufficiently proved, and that all the conditions existed which would qualify the witness to give an opinion as to value, except that of personal knowledge, and that, as we

have seen, was not necessary. If the defendant had requested that the facts appearing in the evidence should be assumed and stated in an hypothetical question, it is fair to assume that his request would have been complied with. We are therefore of opinion that there was no error in receiving the evidence of this witness as to the value of the vessel.

3. Alfred Ogden, defendant's vice-president, was called by it as a witness, and asked this question: "According to your understanding of the use of words in the business of insurance, what do the words 'port risk' mean?" This was objected to on the part of the plaintiff as being no longer an open question in this state, as the court of appeals had settled what "port risk" means, in *Nelson v. Insurance Co.*, 71 N. Y. 453. The court excluded the question, and the defendant excepted to the ruling. The counsel for the defendant gave the court no information as to what he expected to prove by the witness, and in no way indicated the particular purpose of the question. The attention of the court was called to the case referred to, where it is stated in the opinion that "port risk in a marine insurance policy means a risk upon a vessel while lying in port, and before she had taken her departure upon another voyage." That decision having been made several years before this policy was issued, we think it just to hold that the term must have been used in the policy with the meaning thus given to it by this court. If it was the purpose of the question to show that it did have such meaning, then it was wholly unnecessary. If it was intended to show that it had any other or different meaning, or if there was any other purpose, the intent and purpose should have been disclosed to the court, so that the proper ruling could have been intelligently made. It is impossible to perceive what the object of the question was, as, at the time of her destruction, the vessel was in the port of New York, and had not yet started upon her voyage. She was not rigged for the voyage, and her crew had not yet been shipped. It is impossible to perceive why the destruction of the vessel under such circumstances was not a "port risk in the port of New York;" and the trial judge did not err, in the absence of any further information than was given him, in so holding. But we think that in all policies issued in this state since the opinion in the case referred to was pronounced and published, these words should have the meaning given them therein, as it is most probable that such would be the meaning attached to them by the parties using them.

4. The defendant's counsel requested the court to charge the jury as follows: "The burden of proof is on the plaintiffs to establish to your satisfaction that the loss of this vessel took place without any agency or instrumentality of the plaintiffs, direct or in-

direct," and that "the plaintiffs must establish this fact, that the loss was without any agency or instrumentality of theirs, by a clear preponderance of credible testimony." The court refused to charge either of these requests, and to the refusals the defendant excepted; and it is now claimed that in this the court erred. The rule contended for by the defendant would be quite unfair and impracticable in the trial of insurance cases. Where there is an insurance against a loss by fire, and it is proved or admitted that the property insured has been destroyed by fire, the loss is brought literally and exactly within the terms of the policy. If, in such a case, the insurance company claims to be exempt from paying the sum insured, because there has been a breach of some condition contained in the policy, or the violation of some obligation or duty imposed upon the insured by the law or contract, the burden rests upon it to establish the facts which it thus relies upon as a defense to the claim under the policy. Every presumption of law is against the commission of a crime, and in all forms of action, civil and criminal, every person is presumed to be innocent until his guilt has been established by at least a preponderance of evidence. These humane rules of law would be violated if a person suing upon a policy insuring his property against fire was bound to assume the burden of showing that he was not guilty of the crime of burning his own property. The defendant making that allegation against him must bear the burden of establishing it. *Tidmarsh v. Insurance Co.*, 4 Mason, 439, Fed. Cas. No. 14,024; *Fiske v. Insurance Co.*, 15 Pick. 310; *Murray v. Insurance Co.*, 85 N. Y. 236; *Heilman v. Lazarus*, 90 N. Y. 672; 1 Greenl. Ev. § 35; *Roscoe*, Ev. 52. The burden in such a case to prove the crime of incendiarism should rest upon him who alleges it, just as the burden of proving insanity rests upon him who assails a will, deed, or other instrument upon that ground. 1 Williams, Ex'rs (6th Am. Ed.) 24; 1 Redf. Wills, c. 3, § 4; *Schouler*, Wills, §§ 147, 173. In 1 Greenl. Ev. (Redf. Ed.) § 80, the learned author says: "Where the negative allegation involves a criminal neglect of duty, whether official or otherwise, or fraud, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and of quiet possession, is in favor of the party charged." Here the burning and destruction of the vessel are admitted in the answer, and the defendant makes the allegation and tenders the issue that the fire was caused by the insured; and in such a case it is a just rule to hold that the defendant, by the issue it has thus made, has assumed the burden of maintaining its allegations.

We have carefully considered the other al-

legations of error to which our attention has been called, and are satisfied that they are not well founded. They are sufficiently treated in the opinion below, and need no	further attention here. The judgment should be affirmed, with costs. All concur, except ANDREWS and PECK- HAM, JJ., dissenting.
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PEOPLE v. McELVAINE.

(24 N. E. 465, 121 N. Y. 250.)

Court of Appeals of New York. April 29, 1890.

Appeal from court of oyer and terminer, Kings county.

George M. Curtis, for appellant. *James W. Ridgway*, Dist. Atty., for respondent.

RUGER, C. J. The defendant upon trial was convicted of the crime of murder in the first degree, for having killed one Luca in his own house, in Brooklyn, about 3 o'clock in the morning of the 23d day of August, 1889. The evidence showed that the defendant entered the house through a window in the second floor, by means of a ladder, which he found on the premises, and that such entrance was effected by forcibly removing a wire screen from the window. Access to this window was obtained from a back yard, into which an unlocked gate opened from the street. The deceased was killed by stabs with a knife inflicted upon him while endeavoring to forcibly prevent the escape of the accused from the room which he first entered. Twelve stabs were given, of which four were described to have been mortal. The defendant was positively identified by two persons who saw him in the act of inflicting the wounds, and was immediately arrested by the police officers in the street near the gate, within 100 feet of the premises, with a bloody knife in his possession. Independent of the confessions subsequently made by the defendant to the police officers and others, no doubt could possibly be entertained, on the evidence, as to the identification of the accused as the person who committed the homicide. No effort was therefore made on the trial to show that he was not the person who caused the death of Luca. The sole defense attempted was the alleged insanity of the accused. Considerable evidence was given on the trial in his behalf, tending to show that he possessed a defective mental organization, and was subject to delusions and hallucinations, which were claimed to be evidence of his insanity. Two witnesses were called on his behalf, as experts, who respectively gave evidence tending to show a belief that he was, to a certain degree, insane. Two expert witnesses were also called on behalf of the prosecution, to give opinions upon the question of the defendant's sanity, and each testified that he was, in their opinion, sane. It cannot be questioned but that the evidence of these witnesses was material, and had weight with the jury, upon the question of the defendant's mental condition. If these opinions were based upon an erroneous hypothesis, and were founded in any material respect upon indefinite or unascertainable conditions, or upon considerations which were not the proper subject of expert evidence, they must be regarded as having been erroneously admitted.

The only serious objection to the conviction arises upon an exception to the ruling of the court permitting Dr. Gray, a witness for the prosecution, and an expert of high reputation and character, to

answer, against objection, a hypothetical question as to the defendant's sanity. The question put by the district attorney, and the proceedings accompanying the question, were as follows: "Question. Now, are you able to say whether, in your judgment, based upon all the testimony, the acts of the defendant on the night of this homicide, the testimony as to his past life given by the witnesses in his defense, and based upon the whole case, whether this young man is sane or insane? Mr. Curtis. I object, as it is not a question properly put. The Court. Why not? Mr. Curtis. It is too vague and indefinite. In order to put an hypothetical question properly, so say the court of appeals, it must consist of specifically proven facts, which come within the pale of the proof; not where a person, for instance, is permitted to give an anomalous opinion. The Court. You had better frame the question. Mr. Ridgway. Then I will ask the stenographer to read all the evidence to this witness. The Court. I don't see why the question is not competent. Mr. Curtis. The way is, to take compact, substantial, concentrated oral proof,—what the learned counsel relies on to prove the defendant is sane. The Court. Where a medical witness, who is called as an expert, has been in court during the whole trial, and heard all the testimony in the case, everything that has been done and said by everybody, I don't see why it is not competent to ask him whether, upon those facts, all he heard testified to, he thinks the defendant is sane or insane. This witness has heard all that has been sworn to by everybody. To the Witness. You have heard all the testimony in the case? The District Attorney. Pass the whole testimony of the prosecution and the defense, including the hypothetical question put by Judge Curtis, and everything that you heard sworn to here,—now will you answer the question? (The defense excepts.) A. I have formed an opinion. Q. State it. (The defense excepts.) A. I believe the defendant is sane. Q. What do you believe he was at the time of the commission of the offense? A. I believe he was sane at the time of the commission of the offense." We cannot doubt but that this question was improper. The witness was thus permitted to take into consideration all the evidence in the case given upon a long trial, extending over nine days, and, upon so much of it as he could recollect, determine for himself the credibility of the witnesses, the probability or improbability of their statements, and, drawing therefrom such inferences as, in his judgment, were warranted by it, pronounce upon the sanity or insanity of the defendant. It cannot be questioned but that the witness was by the question put in the place of the jury, and was allowed to determine, upon his own judgment, what their verdict ought to be in the case.

It hardly needs discussion or authority to show the impropriety of this question, and, indeed, the learned trial judge, at a subsequent stage of the proceedings, emphatically protested against the implication that he had permitted such a question to be put to the witness. A reference to

the record, however, shows that the court must then have been laboring under some misconception as to what had really taken place. This might reasonably have happened to any judge from the prejudice excited by the exasperating mode in which the defense was conducted by the prisoner's counsel. The rule as to the conditions governing the formation of hypothetical questions to experts has frequently been discussed and illustrated in the reported cases in this court. It was said by Judge ANDREWS, in the case of *People v. Barber*, 115 N. Y. 491, 22 N. E. Rep. 182, that "the opinion of medical experts, as to the sanity or insanity of the defendant, based upon the testimony in the case, assumed for the purpose of the examination to be true, was undoubtedly competent. So, in connection with their opinion, they could be permitted to state the reason upon which it was founded. * * * But inferences from facts proved are to be drawn and found by the jury, and cannot be proved as facts by the opinion of witnesses." In *Reynolds v. Robinson*, 64 N. Y. 595, Judge EARL, in speaking of evidence attempted to be given under an hypothetical question, says: "In such a case it is not the province of the witness to reconcile and draw inferences from the evidence of other witnesses, and to take in such facts as he thinks their evidence has established, or as he can recollect and carry in his mind, and thus form and express an opinion. His opinion may be obtained by stating to him a hypothetical case, taking in some or all of the facts stated by witnesses, and claimed by counsel putting the question to be established by their evidence, and when the question is thus stated the witness has in his mind a definite state of facts, and the province of the triers, whether referees or jurors, is not interfered with." So, too, it was said by Judge MILLER in *Guiterman v. Steam-Ship Co.*, 83 N. Y. 358, that it is not the province of an expert witness "to draw inferences, or to take in such facts as he can recollect, and thus form an opinion." In *Gregory v. Railroad Co.*, reported in 28 N. Y. St. Rep. 726, 8 N. Y. Supp. 525, the court hold: "An expert witness cannot be asked to give an opinion based upon what he has heard other witnesses testify. Such opinion must be based on an hypothetical question containing facts which are assumed to have been proven." The case of *People v. Lake*, 12 N. Y. 358, is not an authority for appellant on the question under discussion. The court in that case did not concur in the opinion written, but placed their decision upon two propositions: one of which only bears upon the question here, and that was that "the court of oyer and terminer erred in permitting physicians, who did not hear all the evidence relating to the mental condition of the prisoner, to give opinions as to his sanity, founded on the portion heard by them." The question was not mooted or decided whether, in case they had heard all of the evidence, they could give opinions based thereon; but it passed off solely upon the question whether a person, who had heard only a part of the evidence upon a trial, could give an opinion based upon the portion of the evidence so heard by him. It is true

that an implication may be drawn from the decision that, if the witness had heard the whole evidence, he might properly have given his opinion; but that question was not in the case, and it falls far short of being an authority on the point.

The case of *Sanchez v. People*, 22 N. Y. 150, is to a similar effect. Two opinions were delivered in that case, but neither of them secured the concurrence of the court. The decision was placed upon the decision in the *Hartung Case*, (Id. 95,) and had no reference to the question under consideration here. The case of *People v. Thurston*, 2 Parker Crim. R. 49, was in the supreme court, and failed to secure the concurrence of the court in the grounds upon which it was decided. No rule was therefore legally formulated by the decision, but the inferences to be drawn from the opinions read are plainly opposed to the people's contention here. No other decisions from this state are cited, and we deem it unnecessary to discuss or consider the rules prevailing in other countries, in view of the reported decisions made in our own courts.

An attempt was subsequently made to, in some degree, cure the error committed, by proving by the witness that in answering the question he assumed the truth of the evidence given by the defendant's witnesses: but we think this did not remove the vice inherent in the question. Even as thus affected, it left the uncertainty of his memory as to all the evidence in the case, and the freedom of his judgment as to all other evidence, to give such weight as he should in his own mind determine it was entitled to, and substantially allowed him to usurp the functions of the jury in deciding the questions of fact. We think it is not competent, in any case, to predicate an hypothetical question to an expert upon all of the evidence in the case, whether he has heard it all or not, upon the assumption that he then recollects it; for it would then be impossible for the jury to determine the facts upon which the witness bases his opinion, and whether such facts were proved or not. Suppose the jury conclude that certain facts are not proved, how are they, in such an event, to determine whether the opinion is not, to a great degree, based upon such facts? When specific facts, either proved or assumed to have been proved, are embraced in the question, the jury are enabled to determine whether the answer to such question is based upon facts which have been proved in the case or not, and whether other facts bearing upon the correctness and force of the answer are contained therein or have been omitted from it: but, in the absence of such a question, the evidence must always be, to a certain extent, uncertain, unintelligible, and, perhaps, misleading. We regret that an error of this character is found in a case which was otherwise tried by the learned court with an intelligent understanding of and adherence to the rules of law applicable to the case, and a strict regard to the rights of the accused; but, in compliance with the uniform practice of courts in capital cases to avoid even the possibility of injustice to the accused, we think the error referred to requires a new trial. All concur.

WILSON et al. v. VAN LEER et ux.

(17 Atl. 1097, 127 Pa. St. 371.)

Supreme Court of Pennsylvania. June 28, 1889.

Error to court of common pleas, Lancaster county; D. W. PATTERSON, Judge.

Issue *decisavit vel non*. Needham Wilson died September 22, 1872, in Lancaster county. His last will and testament, of which the plaintiffs in error were executors, having been duly executed on March 2, 1865, was admitted to probate on September 28, 1872. On August 18, 1877, suit was brought by Caroline Van Leer, formerly Carman, upon the following instrument of writing: "August 13th, 1865. I give these few lines to Caroline Carman to show that I want her to have the sum of twelve hundred dollars at my death she livd with mee A number of years And got verry little for it so i thought it rite to leave her This little sum to be paid to her out of my home property from NEEDHAM WILSON." At that time it was contended for Caroline Van Leer that the paper was a promissory note, and the court below so held, but this court held it to be of a testamentary character, and that it would not support an action of *assumpsit*. Wilson v. Van Leer, 103 Pa. St. 600. Subsequently, on June 23, 1883, this paper was offered for probate before the register of Lancaster county as a codicil to the last will and testament of Needham Wilson, and, having been admitted, upon an appeal taken by the plaintiffs in error, an issue *decisavit vel non* was directed. There were no subscribing witnesses to the execution of the paper. One witness, a sister of Caroline Carman, testified that she saw Wilson write and sign the paper, and the only other witness called in support of it was a brother, Cornelius Carman, who undertook to testify to his signature from an acquaintance with his handwriting. This witness testified that he had seen Wilson write once or twice when he, the witness, was a boy 12 years old, 31 years before the trial, and once afterwards, 23 years before the trial, at a tavern in Lancaster. In commenting upon the testimony of the other witness, who said she saw Wilson write and sign the paper, one of the counsel for plaintiffs in error was about to show the jury, by a reference to the almanac for 1865, that August 13th was Sunday, which was in direct conflict with her testimony. On objection made by counsel, that as the almanac had not been formally offered in evidence no reference could be made to it, the court refused to allow it to be used.

There was a verdict in favor of plaintiffs, and defendants bring error, assigning, *inter alia*, the following grounds: "(2) The court erred in its answer to defendants' third point as follows: (3) If the jury do not believe Cornelius Carman is a competent witness to prove the execution of the alleged codicil, the verdict must be in favor of the defendants. *By the Court*. We deny that point

as stated. The belief of the jury as to Cornelius Carman being a competent witness has nothing to do with his competency. Competency means the legal fitness of a witness to be heard on the trial of a cause. It is a legal question, and the court is the sole judge of his or her competency. The jury has nothing to do in deciding whether they are competent. If the court think they are so interested, or in a position that they cannot testify, they will rule them out; but if they decide he is a competent witness, then that makes his testimony come before you, like that of any other witness. The court is the sole judge of his or her competency. The court admitted Cornelius Carman as a competent witness. His testimony, however, is for the jury, like any other witness. His credibility is for them to determine." "(5) The court erred in refusing to allow counsel for defendants below to refer to the almanac for 1865, in his address to the jury."

S. H. Reynolds and J. Hay Brown, for plaintiffs in error. A. Herr Smith and D. G. Eshleman, for defendants in error.

MITCHELL, J. The competency of Cornelius Carman was in the first instance clearly a matter for the court, and, no subsequent evidence having raised any dispute of fact upon it, the learned judge was right in saying that the court was the sole judge of competency, and refusing to allow the jury to review the ruling. Had the facts upon which the judge held him *prima facie* competent been denied or contradicted, it might have been proper to submit the whole matter to the final decision of the jury, (*Lee v. Welsh*, 1 Wkly. Notes Cas. 453,) but there was no such conflict as made that course necessary. The learned judge was also within the line of authorities in holding that Carman had sufficient knowledge of Wilson's handwriting to make him competent to testify concerning it. It is said to be sufficient if the witness has seen the party write but once, and then only his name, (1 Greenl. Ev. § 577;) and probably no higher standard can be fixed for a definite rule, though, considering the untrustworthiness of opinions on handwriting in general, (see note of Chief Justice REDFIELD to his edition of Greenleaf, vol. 1, § 578,) such evidence ought to be regarded with great caution. Nor in the nature of things is it possible to fix any arbitrary limit of time within which the witness must have seen the writing done. That must depend on his intelligence, his habit of observation of such matters, the apparent strength and confidence of his memory, etc., which must be passed upon in the first instance by the trial judge. Carman's knowledge seems not only to have been extremely stale, but of the narrowest extent; and if the learned judge had held that it was too remote and unreliable to qualify him we should not have been disposed to disagree with him. But the matter was within his discretion, and his conclusion was, as already said, within the line of

the authorities. It was therefore for the jury, and not for us, to determine the weight to which the testimony should be entitled. The assignments of error in relation to Carman's testimony are therefore not sustained.

We are obliged, however, to hold that the court erred in refusing to permit the counsel for defendant below to refer to the almanac to show, in support of his argument against the testimony of Margaret Manahan, that a certain date in 1865 fell upon Sunday. All of the authorities agree that this is one of the matters that do not require to be proved, but are taken judicial notice of without evidence. "Neither is it necessary to prove * * * the coincidence of days of the week with days of the month." 1 Greenl. Ev. § 5; and see Starkey, Ev. pt. 3, § 20, (page 738, 10th Amer. Ed.) "It is * * * wholly immaterial * * * whether the facts of public and general history and their dates are recognized by the court *suapte sponte*, the books and chronicles or almanacs being used merely to aid the memory; or whether they will remain unnoticed until suggested by the parties, and verified by the books; or whether the books themselves are adduced by the parties, and admitted by the court as instruments of evidence; * * * the process and the result being in each case the same." 3 Greenl. Ev. § 269. The mere mode of introducing the almanac seems to vary, as indicated by the last extract from Greenleaf; but, as all the authorities agree that no proof is necessary, it follows that it is not required to be put in evidence at all. "The almanac in such cases is used, like the statutes, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury." State v. Morris, 47 Conn. 179. "The almanac is part of the law of England." POLLOCK, C. B., in Tutton v. Darke, 5 Hurl. & N. 649. In Hanson v. Shackleton, 4 Dowl. 48, there was a rule to set aside a writ, on the ground that it was dated on Sunday, and the report proceeds: "*Col-ridge, J.* Have you any affidavit showing that the day on which this writ is dated was a Sunday? *Bayly.* The affidavit does not state that the day * * * was a Sunday, but, * * * the day of the month being given, the court is bound to take judicial notice on what day of the week that day fell. * * * *Cur. adv. vult.* *Col-ridge, J.* I have consulted the other judges of the court, and they are of opinion that I ought to take judicial notice of what the day was on which this day of the month fell. * * * Rule absolute." So in Reed v. Wilson, 41 N. J. Law, 29, there was a declaration on a note dated August 12th, at four months; and on demurrer assigning, *inter alia*, that the *narr.* showed demand and protest on December 14th, one day too soon, the court took judicial notice that December

15th was Sunday, and therefore that the demand was made on the proper day. In Railroad Co. v. Lehman, 56 Md. 226, it was held that "it is the duty of the court to notice the days of the week on which particular days of the month fall; and hence we know, without other averment, (on demurrer,) that the 28th of July, 1878, was Sunday." And in McIntosh v. Lee, 57 Iowa, 358, 10 N. W. Rep. 895, it was said by the court: "The petition alleges that the defendant entered into the written lease on March 10, 1878. Courts take judicial notice that the 10th day of March, 1878, was Sunday. The petition, therefore, in effect alleges that the lease was executed on Sunday;" and it was therefore held that, under the pleadings, evidence was not admissible that the lease was executed on Monday. These authorities—and none have been found in opposition to them—show clearly that, however often departed from as a matter of convenience, the rule is that matters of which judicial notice is taken, including the dates in the almanac, do not require to be put in evidence at all.

It is argued for the defendant in error that the fact of August 13th having been Sunday did not necessarily contradict Mrs. Manahan, and therefore that, even if the court below committed an error, it was an immaterial one, for which the judgment should not be reversed. But there was an apparent contradiction, which at least required explanation, and, in a case where the evidence in support of the plaintiff's case was so meager, it is impossible to say that even a slight doubt thrown on the testimony of the main witness would not have turned the scale in the minds of the jury.

It is also argued that the almanac, having been brought forward at so late a stage in the case, deprived the plaintiff below of the benefit of an argument upon it by one of her counsel. But in this respect it was like any other argument or illustration which counsel may make towards the end of a case. If it has not been anticipated, it is a surprise, and that is a risk which parties must encounter in every case. If counsel had run the calculation back himself, so as to show that that day was Sunday, no one could have questioned his right to do so. His reference to the almanac was no more than a reference to the multiplication table, as a labor-saving mode of refreshing or confirming knowledge legally presumed to be in everybody's mind. This kind of surprise is one of the dangers incident to every contest, and the only relief against it is the discretion of the judge, where the new matter or new view may lead to substantial injustice, and is such as could not reasonably have been foreseen, to allow an opportunity of reply, or subsequently to grant a new trial. Judgment reversed, and *venire de novo* awarded.

BEVAN v. ATLANTA NAT. BANK.

(31 N. E. 679, 142 Ill. 302.)

Supreme Court of Illinois. June 17, 1892.

Appeal from appellate court. Third district.

Assumpsit by the Atlanta National Bank against John L. Bevan, administrator of the estate of Alice Williams, deceased, upon a promissory note. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Reversed.

Beach & Hodnett, for appellant. F. L. Capps and Blinn & Hoblit, for appellee.

PER CURIAM. This is an action of assumpsit brought by the Atlanta National Bank against John L. Bevan, administrator of the estate of Alice Williams, deceased, upon a promissory note for \$1,000, which purported to be executed by C. E. Pratt and Alice Williams. To the declaration the defendant pleaded the general issue sworn to, and upon a trial the plaintiff recovered a judgment for the amount due on the note, which judgment was affirmed in the appellate court. No complaint is made against the decision of the court in instructions, but it is claimed that the court erred in its rulings in the admission and exclusion of evidence, and upon this ground it is insisted that the judgment is erroneous. The note in controversy bears date May 1, 1888, payable 60 days after date, to the order of Atlanta National Bank, signed, "C. E. Pratt, Alice Williams." No question was raised in regard to the execution of the note by Pratt, but, as to the execution of the instrument by Alice Williams, on the one hand it is claimed by plaintiff that the note contains her genuine signature, while on the other hand the defendant, the administrator of her estate, claims that the signature of Alice Williams to the note is a forgery.

Stephen A. Foley, a witness for the plaintiff, testified, against the objection of the defendant, that he had a conversation with Alice Williams at Atlanta in July or August, 1888, which was, in substance, as follows: "We were talking about family affairs, and finally we came to Charlie, and I asked her if she thought that she would be likely to lose anything by Charlie. I meant Charles E. Pratt. She said she would not. She did not think she should. Charlie had been very good to her, even better than her own children. She said to me, 'You know I have assisted Charlie, and I don't think I will ever lose anything by it.'" It is claimed that the testimony has no reference to the note, and hence is inadmissible. It is true that the note was not mentioned, but it was proper to show the relation existing between the two parties; also that Mrs. Williams had assisted Pratt, and that she did not anticipate any loss on account of the assistance rendered;

and it was for the jury to determine whether the assistance she had rendered had reference to the note or to some other transaction. We do not regard the evidence entitled to much weight, but, at the same time, we think it was competent for the consideration of the jury in connection with the other evidence.

On the trial the plaintiff called as a witness Sylvester Hoblit, who testified that he had seen Alice Williams write, and was acquainted with her signature, and, upon being shown the note in controversy, he testified that the signature of Alice Williams was her genuine signature. On cross-examination the following questions were asked the witness: "Question. You may now examine a note dated Atlanta, Ill., July 14, 1884, for \$50, and state whether or not that is one of the signatures of Alice Williams that you saw her make, and upon which you base your knowledge of her handwriting. (Note shown to witness, marked 'No. 3, L. E. W.')

Q. If there is any difference in the signature of Alice Williams upon that note and the signature of Alice Williams on the note in controversy, you may state in what that difference consists.

Q. You may examine the note shown to you dated October 10, 1884, signed by Alice Williams, and state whether or not that is another of the notes you saw her make, and upon which you base your knowledge of her signature. (Marked 'No. 4, L. E. W.,' for identification by stenographer.)

Q. If there is any difference between the signature of Alice Williams upon the note last shown you and the signature to the note in controversy, you may state in what particular it exists.

Q. You may examine the note shown to you of date June 1, 1885, with the name of Alice Williams signed to it, and state if that is another of the notes you saw her make, and upon which you base your knowledge of her signature.

Q. If there is any difference between the signature of Alice Williams upon that note and her signature upon the note in controversy, you may state what it is. (Note marked 'No. 5, L. E. W.,' by stenographer for identification.)

Q. Is it not true in all of the notes you saw her sign, and which have been shown to you, and to which your attention has been called, she wrote her name 'Allie Williams'?

Q. Is it not true that there is a difference between the signature of Alice Williams on all of these notes you saw her sign, and to which I have called your attention, and upon which you, in whole or in part, base your knowledge of her signature, and the signature of Alice Williams on the note in controversy?

Q. Is it not true in all the notes you saw her sign, and to which your attention has been called here, and upon which you say you base your knowledge of Alice Williams' handwriting, she spells her name different from the way it is spelt in the note in controversy?" The plaintiff objected to the sev-

eral questions, the court sustained the objection, and the defendant excepted. Similar questions were asked other witnesses, and the court made a like ruling. It was claimed by the defendant that Mrs. Williams, in the execution of notes and papers, signed her name "Allie Williams," while the note involved was signed "Alice Williams." Under such circumstances, we are induced to think the rule of cross-examination adopted by the court was too restricted. The several notes which the witnesses had seen Mrs. Williams execute, upon which they predicated their opinion that the signature to the note in question was genuine, were produced and shown the witnesses. Now, if in the execution of all of these notes Mrs. Williams made her given name "Allie" instead of "Alice," no reason is perceived why it was not competent to establish such fact on cross-examination, for the purpose of testing the soundness of the opinion given by the witnesses that the signature to the note in question was genuine. In many cases, in order to ascertain the truth and arrive at a correct result, it is necessary that considerable latitude be given in the cross-examination of witnesses in order to test the accuracy of their evidence. The genuineness of the signatures to the several notes to which the attention of the witness was called was not in controversy, and the purpose was not to prove a signature by comparison, but, as was done in *Melvin v. Hodges*, 71 Ill. 425, to test the accuracy of the witness' opinion or judgment which had in the direct examination gone to the jury. If the witnesses called by the plaintiff to prove that the signature of Mrs. Williams in the note in question predicated their judgment, in whole or in part, upon signatures to notes they saw her sign, and the signatures to these notes differed from the signature in the note in question, it seems plain that the defendant had the right to call out that fact in cross-examination, as it was a fact proper for the consideration of the jury in determining what weight they should give to the opinion of the

witnesses who gave their opinion that the note was genuine.

The defendant offered in evidence the notes which were exhibited to the several witnesses in cross-examination, but the plaintiff objected, and the court sustained the objection, and this decision of the court is relied upon as error. We perceive no ground upon which the notes were admissible in evidence. The law is well settled in this state that the genuineness of a signature to a note or other instrument in writing cannot be proved or disproved by comparing it with another signature, admitted to be genuine. *Kernin v. Hill*, 37 Ill. 209; *Massey v. Bank*, 104 Ill. 330. It is true that the evidence was not offered for comparison of hands, but that did not obviate the difficulty. There are cases where certain evidence may be competent for one purpose, but incompetent for another; but here we do not regard the offered evidence competent for any purpose, and, had it been admitted, its effect on the jury could not have been other than prejudicial to the rights of the plaintiff.

Several of the witnesses of the plaintiff were asked, on cross-examination, whether they held notes signed by Pratt and Mrs. Williams, where the genuineness of her signature was disputed, or were interested in any bank which held such notes, and the court excluded the evidence. It is not claimed that the holding of such a note, or having an interest in the bank which held such a note, would disqualify the witnesses from testifying in the case; but the claim is that the witnesses were interested, and the evidence was competent as affecting their credibility. It is always competent to show, on cross-examination, that a witness is interested in the result of the suit; but here the witnesses had no direct interest in the result of the suit; the interest, if any, was so remote that we do not regard the ruling of the court regarding the evidence as erroneous. For the error indicated the judgment of the circuit and appellate courts will be reversed, and the cause remanded.

CANFIELD v. JOHNSON et al.

NEW ENGLAND MONUMENT CO. v.
JOHNSON et al.

(22 Atl. 974, 144 Pa. St. 61.)

Supreme Court of Pennsylvania. Oct. 5, 1891.

Appeal from court of common pleas, Tioga county; John I. Mitchell, Judge.

Action of assumpsit by C. B. Canfield, surviving partner of C. B. Canfield and G. T. Batterson, doing business as the New England Monument Company, against F. A. Johnson and A. J. Van Dusen, partners as Johnson & Van Dusen. Judgment for defendants, and plaintiffs appeal. Reversed.

The evidence tended to show that the George Cook Post, G. A. R., determined to erect a monument, and appointed a committee to select a suitable design, and procure estimates of the probable cost. Plaintiffs, through their agent, one Douglass, submitted a certain design to the committee, and it was adopted. Afterwards the committee held another meeting for the purpose of receiving bids, at which Douglass was also present. Plaintiffs claimed that Douglass, as their agent, entered into an agreement with defendant Johnson, on behalf of defendants, by which plaintiffs were to allow defendants to make the lowest bid for the erection of the monument, and then that plaintiffs should make and ship the monument according to the design furnished by them, and adopted by the committee, and defendants were to lay the foundation and put it up; each party, out of the contract price between defendants and the committee, to receive fair pay for the materials furnished and work done by them, respectively, and to divide any surplus. Defendants purchased the monument from other persons, having it made after the design furnished by plaintiffs, and this action was brought by plaintiffs to recover one-half of the profits made by defendants.

Stephen F. Wilson, Jerome B. Niles, Aaron R. Niles, and Alfred J. Niles, for appellants. G. W. Merrick, M. F. Elliott, and F. E. Watrous, for appellees.

GREEN, J. The contract in question between these parties was made with the defendants by an agent of the plaintiffs. On the trial, the plaintiffs, having examined the agent who made the contract, and proved by him its terms, as he had made it, proposed to prove that he informed them of what he had done, and that they thereupon accepted the contract, and undertook to execute it. This offer of proof was rejected by the learned court below. It is difficult to understand upon what principle this testimony was rejected. The contract having been made through the intervention of an agent, it was clearly competent to show that the action of the agent was communicated to his principals, and that they accepted and ratified

the contract as he had made it, and that they undertook to carry it out. It is only in that way that the assent of both parties to the contract can be shown, and their willingness to be bound by its terms established. The first and second assignments are sustained.

The plaintiffs proved by overwhelming testimony that the design (No. 161) for the monument was adopted by the Grand Army post and the committee, and that this design was furnished by the plaintiffs. In the course of putting in the testimony on this subject, the plaintiffs offered to prove by whom the design was prepared, and that no similar design had been made by others. This offer was rejected, for the singular reason that no letters patent or copyright of the design had been taken out by the plaintiffs, and therefore they had no exclusive ownership therein. We cannot possibly assent to such a doctrine. Most assuredly, when an architect prepares a design for a building, for one who is about to erect such a structure, he is entitled to be paid for it without being obliged to have it patented or copyrighted. He would be entitled to compensation for it whether it was accepted or not, unless he had expressly agreed otherwise; but certainly, where his design was accepted and actually used by the party to whom it was furnished, it would be a perversion of justice to deny compensation to the designer because he had no patent or copyright for his design. In this particular case, the proof was also admissible because it tended strongly to corroborate the plaintiffs' claim to having made the contract in question with the defendants. We therefore sustain the third assignment, and we also sustain the tenth, because the narr. counted as well for compensation for use of the design as upon the entire contract alleged.

We are quite unable to understand why the offers of testimony covered by the fourth, fifth, sixth, eighth, and ninth assignments of error were rejected. They related to the subject of the cost of building the monument and pedestal upon which it was to stand, the cost of transporting them to the place where they were to be erected, and the cost of setting them up in place. These were all perfectly legitimate matters of proof; indeed, absolutely essential in order to enable the plaintiffs to recover upon their theory of the case; and the sources of the proof were those from which the best attainable information could be obtained. The persons who actually built the monument which was in reality erected by the defendants, and who shipped the same to the defendants, were not allowed to testify to the cost of the shipments, though they named the weight and cost per 100 pounds and the final amount paid; the persons who participated in the transportation of the monument and pedestal from the place where they were made to the place where they were set

up were not allowed to testify to their knowledge upon that subject; the original freight-bills, containing upon their face the precise amounts of freight paid, were rejected for untenable reasons; and the testimony of an experienced and competent person, having an extensive, and claiming to have an accurate, knowledge of the cost of building such monuments and pedestals as the one in question, and of the cost of removing and transporting them, and of setting them up in place, was entirely rejected, and the plaintiffs thereby deprived of the opportunity of proving the very essential facts of their case. The objections to these offers were that they were incompetent and irrelevant. Irrelevant they certainly were not, because they related to the very matters in controversy. They tended to prove directly how much profit the defendants had made by violating their alleged contract with the plaintiffs. Neither were they incompetent, because the persons and the papers offered were the original persons and papers, from whom and which original and material information could be obtained. We have examined all these offers of testimony, and the objections to them, and we are clearly of opinion that they should have been allowed. The objection which seems to be chiefly urged to their admissibility, and which appears to have controlled the court below, is that the offers do not furnish the precise and exact cost in the actual dollars and cents paid by the defendants; and it is argued that the plaintiffs might have called the defendants as witnesses, and proved by them the precise amounts paid in each instance, and, as this was the best evidence, any other testimony was for that reason incompetent. We cannot avoid an expression of surprise that such an objection should have prevailed. It amounts to this: that where a plaintiff who claims damages for the breach of a parol contract for the division of the profits of a mutual transaction seeks to establish his claim, he must call the defendants to prove the exact amounts paid by them in the course of the transaction, on penalty of having all other testimony on that subject rejected. There is no such rule of evidence. The rule that the best evidence of a fact must be produced, if it can be had, has no such meaning. It requires that where two different grades or qualities of proof exist, that which is the best shall be adduced, if practicable; as, for instance, the contents of a writing must be proved by the production of the writing before secondary evidence can be given. But that rule has no application to a choice between witnesses, where both have legitimate knowledge of the subject-matter of the inquiry. Some may have a better knowledge than others, but that will not exclude the knowledge of those who are the less informed, if it is otherwise competent. It is for the jury to judge of the sufficiency of the proof. So, also, the proof offered by the

expert testimony of Mr. Douglass was entirely legitimate, and should have been received. He had a competent experience to qualify him for proving the probable cost of building and transporting the monument and pedestal, and of setting them up, and therefore he was a competent witness for that purpose. Even if there were others who had a better knowledge than he, that would not exclude his testimony. Least of all would it be excluded because the defendants knew exactly what they had paid, and therefore would be the only persons who could testify on that subject. Non constat that they paid more than they should have paid, and thus deprive the plaintiffs of more than their legitimate share of the profits which might have been made had the defendants performed their contract literally. The proof of what the defendants did pay rested with them, and their right to give such proof was not at all impaired by admitting the plaintiffs' offers. After the evidence was all in, the whole case would be for the decision of the jury. All of these several assignments of error are sustained.

The seventh assignment is not sustained. The mere opinions of the members of the committee, as to whether there was a contract between the plaintiffs and defendants, would not be evidence to prove that fact.

We do not agree with the learned court below in holding that there could not be a recovery in the action of assumpsit. The allegations and proof of the plaintiffs were that the defendants had not carried out the contract with them. They had not engaged in the execution of a contract of partnership, or any contract for their mutual advantage or profit. On the contrary, they had proceeded to have the monument and pedestal built and placed exclusively on their own account, and for their own benefit and advantage, and had thus violated the contract which the plaintiffs claimed and gave evidence to prove. In other words, they had broken the contract of partnership or joint interest, and therefore no such contract was performed or executed. In such circumstances, the injury or breach which gives a legal remedy is a violation of the contract of partnership, and not its execution and consequent partnership liability. Hence a partnership bill which lies between persons who actually are partners, and for the settlement of the partnership accounts, is not the proper remedy, simply because, although the defendants agreed to become partners with the plaintiffs in this transaction, in point of fact they did not, and hence the relation did not exist. The action, therefore, must be regarded as an action to recover damages for the breach of a contract to become partners, and for that purpose the proper remedy would be an action of assumpsit on the undertaking. But, of course, while all this is true, the measure of damages would be in accordance with the terms of the contract,

to-wit, one-half of the profits which the defendants did make, or ought to have made, in doing the work in question. Hence it was quite legitimate for the plaintiffs to claim in the narr., and to prove on the trial, that they were entitled to have the one-half of those profits from the defendants, and to give evidence as to what those profits were or should have been. Moreover, as this was a single transaction, without any complicated accounts to adjust, we would incline to hold, were it necessary to do so, that the case came properly within the somewhat numerous decisions of this court, in which it is held that, where the transaction is single, without complicated accounts, and there are no debts to be adjusted, a bill in equity is not necessary for the settlement of the accounts, but an action of assumpsit will lie. Instances of this are to be found in *Wright v. Cumpsty*, 41 Pa. St. 103; *Cleveland v. Farrar*, 4 Brewst. 27; *Galbreath v. Moore*, 2 Watts, 86; *Meason v. Kaine*, 63 Pa. St. 336. It is not necessary to rest the decision of the present case upon this principle, however, as we regard the proceeding as an action to recover damages for the breach of a contract to enter into a partnership or joint relation, and not as a proceeding to settle partnership accounts. The eleventh assignment is sustained.

While it may be that there was not sufficient evidence to show what the profits made by the defendants were, that result was largely due to the rejection by the court of the plaintiffs' offers of testimony, and the plaintiffs could not fairly be held responsible therefor. Technically, therefore, the defendants' second point may have been correctly answered, in view of the actual state of the admitted testimony, and for that reason only we do not sustain the twelfth assignment.

The thirteenth assignment is sustained because we do not agree with the learned court below in holding that there was no evidence that Van Dusen had any knowledge of the contract made by Johnson, and that Johnson had no authority to bind the firm by such

a contract as is alleged by the plaintiffs. It was a contract fairly in the line of their business, and therefore within the authority of a partner. Moreover, Johnson, as a partner, was the authorized agent of the firm for the making of contracts within the scope of the firm's business, and we are of opinion that this contract was within that class. In addition to this, however, the letter of January 18, 1886, to Douglass, signed by the firm name, and in direct answer to the one written by Douglass to the defendants on January 13th, just preceding, would be quite sufficient to take this question of Van Dusen's knowledge to the jury. The letter of the firm to Douglass, of November 28, 1885, is in the same category of testimony. But it would require a most violent presumption, against all the probabilities of the case, to declare that Van Dusen had no knowledge of the contract made by Johnson with the plaintiffs, and we do not consider that the court had any right to make such a presumption as a matter of law. It was for the jury at the best, and there were plenty of facts and circumstances in the case to enable the plaintiffs to challenge the correctness of any such presumption by the jury. A matter much discussed by the counsel for the defendants was the legality of the contract made, or alleged to have been made, by the plaintiffs with the defendants. It was decided against the defendants by the court below, and is not before us. We therefore do not consider it, but that circumstance must not be taken as a concession that there was error in the court's ruling on that subject. While there was perhaps some evidence that the defendants had made profit out of their work, it was scarcely specific enough, or complete enough, to leave to the jury, and we therefore do not sustain the fourteenth assignment. The fault, however, was due to the improper rejection of the plaintiffs' offers of proof, and they cannot be regarded as responsible for the insufficiency of the proof. Judgment reversed, and new venire awarded.

GADY v. STATE.

(3 South. 429, 83 Ala. 51.)

Supreme Court of Alabama. Jan. 6, 1888.

Appeal from criminal court, Jefferson county; S. E. Greene, Judge.

Indictment for embezzlement.

The indictment in this case charged, in a single count, that the defendant, Ada Gady, "did embezzle, or fraudulently convert to her own use, or fraudulently secrete with intent to convert to her own use, eighty dollars in money, consisting of ten-dollar bills and twenty-dollar bills, currency of the United States of America, a more particular description of which money is unknown to the grand jury; which said money was deposited with said Ada Gady by Charles Reed, the property of said Charles Reed, of the value of eighty dollars, and which the said Ada Gady received as the bailee of said Charles Reed." A trial was had on issue joined on the plea of not guilty, which resulted in a verdict of guilty as charged, the value of the money embezzled being assessed at \$60. A motion in arrest of judgment was made, on the ground that the indictment "charges no offense,—is too uncertain in the description of the money alleged to have been embezzled;" which motion was overruled. "On the trial," as the bill of exceptions states, "the testimony for the state tended to prove that, about two months before the finding of the indictment in this case, Charles Reed, the prosecutor in this case, gave to the defendant seventy dollars in money, to be safely kept by her, and to be returned to him when demanded; that this occurred in said county of Jefferson; that defendant returned but ten dollars of said money to said Reed, and had never paid the balance, although often demanded by him to do so, but had embezzled the same. Said Reed, the witness, could neither read nor write, did not know what kind of money he had delivered to the defendant, and could not tell the jury whether it was French or Spanish money, or currency of the United States of America. The solicitor handed the witness a ten-dollar bill, which he stated was a national bank-bill of the United States, and asked the witness if it looked like the money he gave the defendant; and the witness answered that it looked like the money he delivered to the defendant. To this question and answer, each, the defendant duly objected and excepted. The defendant, then being examined as a witness, stated that she got sixty dollars in greenbacks from said Reed. This was, substantially all the evidence in the case. The defendant thereupon asked the court to

charge the jury that they must find a verdict of not guilty, if they believed the evidence." The court refused this charge, and the defendant excepted.

W. J. Callahan, for appellant. Thos. N. McClellan, Atty. Gen., for the State.

SOMERVILLE, J. 1. The amended return, made in response to the certiorari issued from this court, shows that the grand jury was regularly organized and impaneled in accordance with the requirements of the statute. This obviates the objection in this particular based on the original imperfect record, conceding that the objection was well founded.

2. The judgment of the court sentencing the defendant to hard labor to satisfy the costs was perfectly certain, the number of days of imprisonment being specified, as well as the amount of the costs. In this respect it was more full and definite than the judgment of sentence in *Hill v. State*, 78 Ala. 1, and other cases there cited.

3. The indictment was good without averring that the money alleged to have been stolen was of any particular value. It being averred to be "currency of the United States of America," the court judicially knows that the bills, as matter of law, were *prima facie* of a commercial value equal to that imported by their face. This obviated the necessity of either allegation or proof of such value. *Sands v. State*, 80 Ala. 201; *Whart. Cr. Pl.* (8th Ed.) §§ 216, 218; *Duvall v. State*, 63 Ala. 12; *Grant v. State*, 55 Ala. 201.

4. The evidence tended to show that the money alleged to have been stolen was "greenbacks," and this was no variance from the description given in the indictment. *Levy v. State*, 79 Ala. 259; *Duvall v. State*, 63 Ala. 12.

5. The testimony of the witness Reed, that the money stolen from him "looked like" the ten-dollar bill exhibited by the solicitor to him, in presence of the jury, was relevant as a mode of identification. As the witness could neither read nor write, he could testify to nothing more satisfactory than mere appearance or resemblance. The weight of such testimony was for the jury to determine. This testimony was competent whether the bill exhibited was proved to be United States currency or not.

6. The evidence tended to prove the defendant's guilt, as charged in the indictment, and this fact authorized the refusal of the general charge asked in behalf of the defendant.

The judgment of conviction is affirmed.

HANLEY et al. v. DONOGHUE.

(6 Sup. Ct. 242, 116 U. S. 1.)

Supreme Court of the United States. Dec. 14, 1885.

In error to the court of appeals of the state of Maryland.

F. J. Brown, for plaintiffs in error. E. C. Eichelberger, for defendant in error.

GRAY, J. This was an action brought by Michael Hanley and William F. Welch against Charles Donoghue in the circuit court for Baltimore county in the state of Maryland upon a judgment for \$2,000 recovered by the plaintiffs on June 4, 1877, in an action of covenant against the defendant, Charles Donoghue, together with one John Donoghue, in the court of common pleas of Washington county in the state of Pennsylvania, and there recorded. The declaration contained three counts. The first count set forth the recovery and record of the judgment as aforesaid in said court of common pleas, and alleged that it was still in force and unreversed. The second count contained similar allegations, and also alleged that in the former action Charles Donoghue was summoned, and property of John Donoghue was attached by process of foreign attachment, but he was never summoned, and never appeared, and that the proceedings in that action were duly recorded in that court. The third count repeated the allegations of the second count, and further alleged that "by the law and practice of Pennsylvania the judgment so rendered against the two defendants aforesaid is in that state valid and enforceable against Charles Donoghue, and void as against John Donoghue," and that, "by the law of Pennsylvania, any appeal from the judgment so rendered to the supreme court of Pennsylvania (which is the only court having jurisdiction of appeals from the said court of common pleas) is required to be made within two years of the rendition of the judgment; nevertheless no appeal has ever been taken from the judgment so rendered against the said defendants, or either of them." The defendant filed a general demurrer to each and all of the counts, which was sustained, and a general judgment rendered for him. Upon appeal by the plaintiffs to the court of appeals of the state of Maryland, the judgment was affirmed. 59 Md. 239. The plaintiffs thereupon sued out this writ of error on the ground that the decision was against a right and privilege set up and claimed by them under the constitution and laws of the United States.

The question presented by this writ of error is whether the judgment of the court of appeals of the state of Maryland has denied to the plaintiffs a right and privilege to which they are entitled under the first section of the fourth article of the con-

stitution of the United States, which declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof;" and under section 905 of the Revised Statutes, which re-enacts the act of May 26, 1790, c. 11, (1 Stat. 122,) and prescribes the manner in which the records and judicial proceedings of the courts of any state shall be authenticated and proved, and enacts that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

By the settled construction of these provisions of the constitution and statutes of the United States, a judgment of a state court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another state, as it has in the state in which it was rendered. *Maxwell v. Stewart*, 22 Wall. 77; *Insurance Co. v. Harris*, 97 U. S. 331; *Green v. Van Buskirk*, 7 Wall. 139; *Cooper v. Reynolds*, 10 Wall. 308. And it is within the power of the legislature of a state to enact that judgments which shall be rendered in its courts in actions against joint defendants, one of whom has not been duly served with process, shall be valid as to those who have been so served, or who have appeared in the action. *Mason v. Eldred*, 6 Wall. 231; *Eldred v. Bank*, 17 Wall. 545; *Hall v. Lanning*, 91 U. S. 160, 168; *Sawin v. Kenny*, 93 U. S. 289.

Much of the argument at the bar was devoted to the discussion of questions which the view that we take of this case renders it unnecessary to consider; such as the proper manner of impeaching or avoiding judgments in the state in which they are rendered, for want of due service of process upon one or all of the defendants; or the effect which a judgment rendered in one state against two joint defendants, one of whom has been duly summoned and the other has not, should be allowed against the former in the courts of another state, without allegation or proof of the effect which such a judgment has against him by the law of the first state. No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts which must, like other facts, be proved before they can be received in a court of justice. *Talbot v. Seeman*, 1 Cranch, 1, 38; *Church v. Hubbard*, 2 Cranch, 187, 236; *Strother v. Lucas*, 6 Pet. 763, 768; *Dainese*

v. Hale, 91 U. S. 13, 20. It is equally well settled that the several states of the Union are to be considered as in this respect foreign to each other, and that the courts of one state are not presumed to know, and therefore not bound to take judicial notice of, the laws of another state. In *Buckner v. Finley*, 2 Pet. 586, in which it was held that bills of exchange drawn in one of the states on persons living in another were foreign bills, it was said by Mr. Justice Washington, delivering the unanimous opinion of this court: "For all national purposes embraced by the federal constitution the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign to and independent of each other; their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions." 2 Pet. 590. Judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. *Buckner v. Finley*, 2 Pet. 592; *McElmoyle v. Cohen*, 13 Pet. 312, 324; *D'Arcy v. Ketchum*, 11 How. 165, 176; *Christmas v. Russell*, 5 Wall. 290, 305; *Thompson v. Whitman*, 18 Wall. 457. Congress, in the execution of the power conferred upon it by the constitution, having prescribed the mode of attestation of records of the courts of one state to entitle them to be proved in the courts of another state, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the state from which they are taken, a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed, unless disproved by extrinsic evidence or by the record itself. *Knowles v. Gas-Light & Coke Co.*, 19 Wall. 58; *Settlemier v. Sullivan*, 97 U. S. 444. But congress has not undertaken to prescribe in what manner the effect that such judgments have in the courts of the state in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject.

Upon principle, therefore, and according to the great preponderance of authority (as is shown by the cases collected in the margin¹), whenever it becomes necessary for

a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact. The opposing decisions in *Ohio v. Hinchman*, 27 Pa. St. 479, and *Paine v. Schemmady Ins. Co.*, 11 R. I. 411, are based upon the misapprehension that this court, on a writ of error to review a decision of the highest court of one state upon the faith and credit to be allowed to a judgment rendered in another state, always takes notice of the laws of the latter state; and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort. When exercising an original jurisdiction under the constitution and laws of the United States, this court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of each of the United States. But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here. In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. *Course v. Stead*, 4 Dall. 22, 27, note; *Hinde v. Vattier*, 5 Pet. 398; *Owings v. Hull*, 9 Pet. 607, 625; *U. S. v. Turner*, 11 How. 663, 668; *Pennington v. Gibson*, 16 How. 65; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 230; *Cheever v. Wilson*, 9 Wall. 108; *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 230; *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. 857. But on a writ of error to the highest court of a state, in which the revisory power of this court is limited to determining whether a question of law depending upon the constitution, laws, or treaties of the United States has been erroneously decided by the state court upon the facts before it, while the law of that state, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error; yet, as in the state court, the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in *Green v. Van Buskirk*, 7

J. Law, 184; *Elliott v. Ray*, 2 Blackf. 31; *Cone v. Cotton*, Id. 82; *Snyder v. Snyder*, 25 Ind. 399; *Pelton v. Platner*, 13 Ohio, 209; *Horton v. Critchfield*, 18 Ill. 133; *Rape v. Heaton*, 9 Wis. 328; *Crafts v. Clark*, 31 Iowa, 77; *Taylor v. Barron*, 10 Fost. 78, and 35 N. H. 484; *Knapp v. Abell*, 10 Allen, 485; *Mowry v. Chase*, 100 Mass. 79; *Wright v. Andrews*, 130 Mass. 149; *Bank of U. S. v. Merchants' Bank*, 7 Gill, 415, 431; *Coates v. Mackey*, 56 Md. 416, 419

¹ *Scott v. Coleman*, 5 Litt. 349; *Thomas v. Robinson*, 3 Wend. 267; *Sheldon v. Hopkins*, 7 Wend. 435; *Van Buskirk v. Mulock*, 18 N.

Wall. 139. The case comes, in principle, within the rule laid down long ago by Chief Justice Marshall: "That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned." *Talbot v. Seeman*, 1 Cranch, 1, 38. Where by the local law of a state, as in *Tennessee* (*Hobbs v. Memphis & C. R. Co.*, 9 Heisk. 873), its highest court takes judicial notice of the laws of other states, this court, also, on writ of error, might take judicial notice of them. But such is not the case in Maryland, where the court of appeals has not only affirmed the general rule that foreign laws are facts which, like other facts, must be proved before they can be received in evidence in courts of justice, but has held that the effect which a judgment rendered in another state has by the law of that state is a matter of fact, not to be judicially noticed without allegation and proof; and consequently that an allegation of the effect which such a judgment has by law in that state is admitted by demurrer. *Baptiste v. De Volunbrun*, 5 Har. & J. 86, 98; *Wernwag*

v. Pawling, 5 Gill & J. 500, 508; *Bank of U. S. v. Merchants' Bank*, 7 Gill, 415, 431; *Coates v. Mackey*, 56 Md. 416, 419.

From these considerations it follows that the averment in the third count of the declaration, that by the law of Pennsylvania the judgment rendered in that state against Charles Donoghue and John Donoghue was valid and enforceable against Charles, who had been served with process in that state, and void against John, who had not been so served, must be considered, both in the courts in Maryland and in this court, on writ of error to one of those courts, an allegation of fact admitted by the demurrer. Upon the record before us, therefore, the plaintiff appears to be entitled, under the constitution and laws of the United States, to judgment on this count. It having been admitted at the bar that the other counts are for the same cause of action, it is unnecessary to consider them. The general judgment for the defendant is erroneous, and the rights of both parties will be secured by ordering, in the usual form, that the judgment of the court of appeals of Maryland be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

LLOYD v. MATTHEWS et al.

(15 Sup. Ct. 70, 155 U. S. 222.)

Supreme Court of the United States. Dec. 3, 1894.

No. 81.

In Error to the Court of Appeals of the State of Kentucky.

Hattie A. Matthews held the demand note of E. L. Harper for \$5,000, on which the interest had been paid to January 1, 1882. June 21, 1887, Harper was the owner of some shares of stock in the Fidelity Building, Savings & Loan Company of Newport, Ky., worth about \$5,000, which he, being insolvent, transferred on the morning of that day to Miss Matthews in part payment of the debt, by blank indorsement in the building company's book. Afterwards the name of J. H. Otten was inserted as a proper person to obtain the money, and for this reason he was made a party to these proceedings, though having no real interest therein. A few hours after the transfer, Harper made an assignment of all his property for the benefit of his creditors under the insolvent laws of Ohio, and, the person named as assignee failing to qualify, H. P. Lloyd, the present plaintiff in error, was appointed, by the proper court, such assignee. Certain creditors of Harper brought suit in the chancery court of Campbell county, Ky., on their several debts, and attached the stock as the property of Harper. These cases were consolidated, and while they were pending, September 16, 1887, Miss Matthews and Otten filed their joint petition to be made parties defendant, which was done. They alleged the ownership by Harper of the stock; the transfer by indorsement in the book, which was made an exhibit; that Miss Matthews was a creditor of Harper to an amount equal to the face value of the stock; that the transfer of the stock was made some hours before the execution of the deed of assignment by Harper, and was bona fide, and for a valuable consideration, and passed all Harper's interest; that Harper was a citizen and resident of the state of Ohio at the time of the assignment and therefore; that "by the laws in existence at that time in said state of Ohio, debtors had the right to make preferences in the payment of their creditors, either in the deed of assignment or by paying them theretofore, in such a way as they saw proper"; that Lloyd had been made a party as assignee, and was claiming the stock as part of Harper's estate, while the plaintiffs in the consolidated cases asserted their claims under the attachments; and praying that the stock be adjudged to Miss Matthews. January 14, 1888, Miss Matthews and Otten filed a joint amended answer, attaching the note as an exhibit, and making this and their former petition a cross petition. On the same day Lloyd, assignee, filed a reply to the answer and answer to the

cross petition. This pleading contained five paragraphs. The first denied that Harper owed Miss Matthews anything at the time the stock was assigned; admitted that at the time of the execution of the assignment Harper and Miss Matthews were both citizens and residents of the state of Ohio; denied "that at the time of making said assignment debtors had by the laws of the state of Ohio the right to prefer their creditors in the deed of assignment." The second paragraph asserted that the transfer and conveyance of the stock to Otten by Harper was made for the purpose and with the intent to defraud the creditors of Harper of their just and lawful debts, and that such transfer and assignment was fraudulent and void under and by virtue of section 4196 of the Revised Statutes of the state of Ohio, which provided as follows, to wit:

"Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods or chattels, shall be deemed utterly void and of no effect."

The third paragraph denied any consideration for the transfer. The fourth alleged the transfer to be fraudulent and done with intent to hinder and delay Harper's creditors. The fifth averred that the transfer was made by Harper with the intent to prefer Miss Matthews, if she was a creditor, which defendant denied, over his other creditors, and was void under section 6343 of the Revised Statutes of the state of Ohio, which reads as follows:

"All assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter."

On May 18, 1888, Miss Matthews filed reply to the original answer and cross petition of Lloyd, trustee, as follows:

"The defendant Hattie A. Matthews, for reply to answer and cross petition of H. P. Lloyd says she admits E. L. Harper was insolvent when he assigned the building association stock to her.

"She admits that he assigned the stock to her with the intention to prefer her to the exclusion of the creditors, but, as was stated in her original pleadings, this was allowable under the laws of Ohio.

"She denies that under the provisions of the laws which are set out in said pleading of Lloyd, to which this is a reply, there is anything which invalidates the transfer of

the stock to this defendant, the same involved in the case.

"Wherefore the defendant prays as in her original pleadings, and for general relief."

The chancery court rendered judgment in favor of Lloyd, trustee, for the full value of the stock, amounting as a money demand against the building association to the sum of \$4,914.89, and Miss Matthews and Otten appealed to the court of appeals of the state of Kentucky, which reversed the judgment of the chancery court, and remanded the cause, with directions to render judgment in favor of Miss Matthews, in conformity to the opinion. *Matthews v. Lloyd*, 89 Ky. 625, 13 S. W. 106.

To review this judgment a writ of error from this court was allowed.

H. P. Lloyd and C. L. Raison, Jr., for plaintiff in error. Chas. H. Fisk and Chas. J. Helm, for defendant in error.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The federal question upon which plaintiff relies to sustain our jurisdiction is that, under the statutory law of Ohio set out in his pleading, the transfer of the stock in question was void, and that the court of appeals of Kentucky in rendering judgment did not give that full faith and credit to the public acts, records, and judicial proceedings of the state of Ohio which the constitution and the law of the United States require. Const. art. 4, § 1; Rev. St. § 905.

The first error assigned is as follows: "The court of appeals of Kentucky erred in the decision rendered in this case below, in failing to give full faith and credit to the laws of the state of Ohio which were presented in the pleadings, in failing to give full faith and credit to the judicial construction of such laws by the highest court of said state, and in failing to give full faith and credit to the judicial proceedings of the probate court of Hamilton county, Ohio, as set forth in the pleadings."

We do not find that the record contains any judicial proceedings of the probate court of Hamilton county, Ohio, but suppose the reference to be to proceedings in insolvency upon the filing of the deed of assignment by Harper, under which Lloyd, trustee, claims, and that such insolvency proceedings could have no greater effect on the question of title than allowed by the laws of Ohio in the matter of the preference of creditors.

The court of appeals of Kentucky held that, as the parties all resided in Ohio, and the entire transaction occurred there, its validity was to be tested by the law in force there; that at common law a debtor had a right to prefer a creditor, either by payment or an express preference in a deed of assignment; that he had a right to pay his debt, and it was only by virtue of statutory law that such

a payment could be held invalid, and the creditor be compelled to surrender his advantage; that in the absence of any showing of the existence of such a statute in another state, it must be presumed that the common law was in force there; that section 6343 of the Revised Statutes of Ohio, set out in the pleadings, did not appear "to embrace a case like this one, but to relate alone to preferences made in deeds of assignment to trustees for creditors generally"; that this transfer could not properly be held to be a part of the deed of assignment; and that, tested by the rules of the common law, the preference was not invalid.

Now, in arriving at these conclusions, the court of appeals did not concur with the views of Harper's assignee; but does it therefore follow that full faith and credit was denied to the laws of Ohio and to the construction of such laws by the highest court of that state? The courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states; but in the supreme court of the United States, when acting under its appellate jurisdiction, whatever was matter of fact in the state court whose judgment or decree is under review is matter of fact there. And whenever a court of one state is required to ascertain what effect a public act of another state has in that state, the law of such other state must be proved as a fact. *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 Sup. Ct. 398; *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242.

The court of appeals was obliged to determine the case on the record, and plaintiff in error had failed to plead the construction given the Ohio statutes by the courts of Ohio, or to introduce the printed books of cases adjudged in the state of Ohio, or to prove the common law of that state by the parol evidence of persons learned in that law, or to put in evidence the laws of that state as printed under the authority thereof, or a certified copy thereof, as provided by the law of Kentucky. Gen. St. Ky. 1888, c. 37, §§ 17, 19, pp. 546, 547.

The court of appeals was left, therefore, to construe the parts of the Ohio laws that were pleaded as it would local laws; and it is settled that under such circumstances, where the validity of a state law is not drawn in question, but merely its construction, no federal question arises. As was remarked in *Glenn v. Garth*, 147 U. S. 360, 368, 13 Sup. Ct. 350: "If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore be-

lieved to have been contemplated." *Banking Co. v. Marshall*, 12 How. 165; *Cook Co. v. Calumet & C. Canal & Dock Co.*, 138 U. S. 635, 11 Sup. Ct. 435.

This record contains nothing to show as matter of fact that the public acts of Ohio had by law or usage in Ohio any other effect

than was given them by the court of appeals of Kentucky.

Writ of error dismissed.

Mr. Justice HARLAN was of opinion that the writ of error should be retained and the judgment affirmed.

STATE ex rel. THAYER v. BOYD.

(51 N. W. 964, 34 Neb. 435.)

Supreme Court of Nebraska. April 7, 1892.

On motion to reinstate. Motion denied.

M. B. Reese, Joseph H. Blair, and Chas. A. Goss, for the motion. J. C. Cowin, opposed.

POST, J. A sufficient statement of the facts in this case will be found in the several opinions heretofore filed (31 Neb. 682, 48 N. W. 739, and 12 Sup. Ct. 375), reversing the judgment of ouster against the respondent in favor of the relator, and remanding the case for further proceedings in this court. On the 15th day of March the respondent filed with the clerk of this court the mandate from the supreme court of the United States, and moved for judgment in his favor on the pleadings. The motion aforesaid came on for hearing the next day, in accordance with the practice of the court, and was sustained, and the action dismissed, the relator making no appearance. The relator now, by the motion under consideration, asks to have the judgment of dismissal set aside, and for leave to reply and proceed to trial on the merits of the case. It is claimed by him that his failure to resist the motion for judgment is not attributable to any fault or negligence on his part, but to the fact that he was at the time in question absent, in a distant part of the state, and had no notice of the respondent's intention to take any action at that time. This claim, in my judgment, is fully sustained by the affidavits accompanying the motion, which are not contradicted. If this were an ordinary proceeding,—that is, one in which a cause of action by a competent and proper party is conceded,—I would say without hesitation that the present motion should be sustained. It could not, in that case, be denied, without reversing the rule which has prevailed in this court since my first acquaintance with it. The respondent as well as the court acted upon the assumption that due and sufficient notice of his motion had been given. The neglect to give proper notice was occasioned by a change of counsel for the relator. It is evident that the parties were acting in good faith, and we have no occasion to impute blame to any one for the failure.

It is insisted by counsel for the relator that the only question determined by the supreme court of the United States is that the naturalization of the respondent's father is well pleaded in the answer; in other words, that under the allegations thereof respondent might prove that his father completed his naturalization during his (respondent's) minority; and he accordingly tenders a reply in the nature of a general denial of that part of the answer. It is not necessary for the purpose of this motion to consider the question of the citizenship of the respondent, or to determine to what ex-

tent, if at all, the judgment of the supreme court is conclusive on that question, since the motion should be denied on other grounds. Nor is it necessary to determine whether, in case the respondent is not a citizen, and therefore not eligible to the office of governor, the relator or the lieutenant governor would be entitled to the possession and emoluments thereof. Whatever right the relator may have had to institute this action in the first instance, it is clear to my mind that he has now no authority to prosecute it further. It appears from the records in this case that a writ of ouster was issued from this court, by virtue of which the respondent was removed from the office of governor, and the relator installed therein. It is a fact of which we must take notice that the respondent is now in possession of said office, and discharging the duties thereof. We know, too, from our records, that no order has been allowed or issued for restoration to respondent of the office from which he was ousted. The inference is, therefore, that the office was voluntarily surrendered by the relator. It is not necessary, however, to rest our conclusion upon an inference. That the relator, on the 8th day of February, 1892, voluntarily, and on his own motion, surrendered the office in question to the respondent, is a fact which ought to be and is generally known. It is a part of the political history of the state, of which the courts will take notice without proof. 1 Greenl. Ev. 6; Brown v. Piper, 91 U. S. 37, 12 Am. & Eng. Enc. Law, 151.

It is a rule well settled in this state that a private person, having no direct interest in the office in controversy, cannot maintain, on his own relation, proceedings by quo warranto to test the title of another thereto. State v. Stein, 13 Neb. 530, 14 N. W. 481; State v. Hamilton, 29 Neb. 198, 45 N. W. 279. Having voluntarily surrendered the office, the relator has no better title thereto, or right to prosecute this action, than any other private citizen of this state. His title is possessory only. His right to hold over in case the respondent is ineligible is at most an incident to his prior possession of the office. The distinction should be kept in mind between this case and one in which the state in its sovereign capacity interposes in the manner prescribed by law for the purpose of testing the title of an incumbent to an office. The statutory authority for this proceeding is found in section 1, c. 71, Comp. Laws, as follows: "Section 1. When any citizen of this state shall claim any office which is usurped, invaded, or unlawfully held and exercised by another, the person so claiming such office shall have the right to file in the district court an information in the nature of a quo warranto, upon his own relation, and with or without the consent of the prosecuting attorney, and such person shall have the right to prosecute said information to final judgment: provided, he shall have first applied to the prosecuting at-

torney to file the information, and the prosecuting attorney shall have refused or neglected to file the same." The proceeding contemplated by the section quoted is a contest between two claimants for an office. It does not differ materially from any other contention involving private rights. Like other cases in which the plaintiff relies upon prior possession as evidence of title, proof of a voluntary abandonment is a complete defense. It is said in *Shortt on Informations* (Am. Ed.) 183: "He alone is a competent relator who has some interest other than such as belongs to the community at large in the question to be tried by the quo warranto, and who has not by any of the methods already adverted to disqualified himself from acting as prosecutor." Among the acts which are referred to above as disqualifying one to act as relator are the following (page 177), viz.: Where it is sought to impeach a title conferred by a corporation election, in which the relator has concurred. Where the relator was present and concurred in the election of the respondent as mayor. Where it was claimed an election to membership in a board of health was void for the reason that the official ballots were informal, it was held that the relator was disqualified by reason of having voted a similar ballot. This case is clearly within the principle of these authorities. The act of the relator in surrendering the office to the respondent, and voluntarily retiring therefrom, disqualifies him to longer act as relator, and is in effect an abandonment of the action.

It is suggested that the surrender of the office to the respondent was the result of a misconception of the effect of the judgment of the supreme court of the United States, and of what issues are concluded

thereby. In his affidavit he says, in substance, that on the 8th day of February he was induced to believe that when the mandate of that court was received it would contain an order to this court to enter judgment that the respondent had for more than two years last prior to the general election in 1890 been a citizen of the United States. The records of the courts in this country are always accessible to those interested in their judgments and decrees. A mandate is a judicial command, issued by a court or magistrate, directing the proper officers to enforce a judgment or decree. *Bouv. Law Dict.* The relator was bound to know, and we must assume did know, that the mandate, when issued, would be merely a direction to take further proceedings in accordance with the judgment of the supreme court. The judgment of that court, if entered, was notice to relator of what issues were concluded thereby. If judgment had not been formally entered upon the records of the court, he must have known from the opinions filed to what extent his rights were determined by the court. It is a fact within our knowledge that the substance of the opinions was made public within a few hours of the time they were filed. It is not enough for relator to answer that he was wrongly informed as to the effect of the decision. He was bound at his peril to know the law of the case as declared by the court of last resort. Since it is apparent that the relator is without authority to further prosecute, and that this proceeding must for that reason result in a judgment for the respondent, it is evident that the motion to set aside the judgment already rendered, and for leave to reply, should be denied. Motion denied.

The other judges concur.

COMMONWEALTH v. DUNLOP.

(16 S. E. 273, 89 Va. 431.)

Supreme Court of Appeals of Virginia. Dec. 1, 1892.

Error to circuit court of city of Petersburg.

These proceedings were instituted by Mr. Dunlop against the commonwealth to establish the genuineness of coupons tendered by him in payment of taxes, and to recover back the money collected from him for such taxes. There was a judgment in plaintiff's favor, and the commonwealth brings error. Affirmed.

W. H. Mann and R. Taylor Scott, Atty. Gen., for the Commonwealth. Maury & Maury, for the defendant in error.

LEWIS, P. This was a proceeding under the statute for the verification of coupons previously tendered by the plaintiff in payment of taxes. At the trial the plaintiff proved, as alleged in his petition, that no part of the taxes for which the coupons were tendered were school taxes or liquor license taxes. He also introduced a witness, who exhibited for the inspection of the court and jury the bonds from which the coupons had been cut. The witness then testified, without objection, that they were the genuine bonds of the state; that he himself had cut the coupons from them; and that the coupons were genuine; and this was all the evidence in the case. The bonds, copies of which are exhibited with the record, are regular on their face, purporting to be under the seal of the state, and signed by the treasurer and countersigned by the second auditor of the state. They all purport to have been issued pursuant to the act of March 30, 1871, commonly known as the "Funding Bill," except one which purports to be under the act of March 28, 1879, entitled "An act to provide a plan of settlement of the public debt." The commonwealth demurred to the evidence, but the court overruled the demurrer, and gave judgment for the plaintiff.

It is contended for the commonwealth—First, that, to prove the genuineness of the coupons, it was incumbent on the plaintiff to prove the genuineness of the bonds; and, secondly, that this he has failed to do, because the witness does not say that the signatures to the bonds are genuine, or that he is an expert in matters of handwriting, or that the seal affixed to the bonds is the genuine seal of the state. The circuit court decided that the seal proved itself, and that, in the absence of evidence to prove that the bonds were spurious, the evidence adduced established the genuineness of the coupons. We are of opinion that this ruling is correct. It is a rule of evidence, universally recognized, that the courts of a state take judicial notice of its seals and of the signatures of the heads of departments; nor will it be supposed, with-

out proof, that any particular seal is counterfeit or irregularly impressed. The law assumes that the seal of the state is known to all of her judicial officers, and there is nothing in the statute requiring the production of the bonds, in a proceeding like the present, which affects the rule of the common law. The statute now carried into section 412 of the Code simply provides that upon the demand of the party contesting the genuineness of the coupons the bonds from which they were detached shall be produced by the plaintiff as a condition precedent to his right of recovery. Nothing is said about the burden of proving the genuineness of the bonds being on the plaintiff, or that the seal of the state shall not, as in other cases, prove itself; and, had the legislature intended to alter the rule above mentioned, such intention would surely have been unmistakably expressed. This was virtually decided in *Com. v. Hurt*, 85 Va. 918, 9 S. E. 148. There the question was whether, upon the production of the bonds by the plaintiff, it was competent for the commonwealth to cross-examine the witnesses as to the genuineness of the signatures to the bonds. The trial court ruled that it was not, unless a plea of non est factum should be first filed. But this court reversed that ruling on the ground that the commonwealth was entitled to show, if she could, without filing such plea, which was not contemplated by the statute, that the bonds were spurious, and thereby to show that the detached coupons were not genuine. It was not suggested, either by counsel or by the court in that case, that the statute required anything more than the production of the bonds. On the contrary, it was assumed that the burden of proving that the bonds were not genuine was on the commonwealth, and the statute is the same now in this particular as it was when that case was decided. It is also contended for the defendant in error (the plaintiff below) that the provision of the statute requiring the production of the bonds to prove the genuineness of the coupons is unconstitutional. And *McGahey v. Virginia*, 135 U. S. 662, 10 Sup. Ct. 972, is relied on for this position. That, however, was a suit by the state against the taxpayer, while the present is a suit by the taxpayer against the state; and it is an established principle that, when the sovereign consents to be sued, the terms and conditions upon which such consent is given must be observed. Nor can a party avail himself of the benefit of a statute, and at the same time contest its validity. *Purcell v. Conrad*, 84 Va. 557, 5 S. E. 545; *Daniels v. Tearney*, 102 U. S. 415. A taxpayer whose tender of coupons is refused may undoubtedly set up the tender as a defense in any subsequent suit by the state against him for the recovery of the taxes. But if, upon the refusal of the tender, he chooses, as in the present case, to pay in money, and then sues the state to establish the genuineness of the coupons, and to recover back the money

so paid, he must conform to the conditions | already stated, and without considering any
prescribed by the statute, giving him per- | other question discussed at the bar, the judg-
mission to sue. For the reasons, however, | ment must be affirmed.

PIERCE et al. v. INDSETH.

(1 Sup. Ct. 418, 106 U. S. 546.)

Supreme Court of the United States. Jan. 8, 1883.

In error to the circuit court of the United States for the district of Minnesota.

This is an action by the plaintiff in the court below, Ole A. Indseth, against the defendants, composing the firm of Pierce, Simmons & Co., on a foreign bill of exchange, payable at sight to his order, drawn by them at Red Wing, in Minnesota, on the Christiania Bank, in Norway, which is as follows:

"Exchange 15,441 50-100 kroner, per stamp 2c.
Pierce, Simmons & Co., Bankers.

"Red Wing, Minnesota, February 1, 1877.

"At sight of this original of exchange (duplicate unpaid) pay to the order of O. A. Indseth 15,441 50-100 kroner, value received, and charge same to account of Sk. P. I. & Co., Chicago, as per advice from them. Pierce, Simmons & Co.

"To Christiania Bank of Kredit Kasse, Christiania, Norway."

The value of these kroners in our money was \$4,469.35.

Indseth resided at the time near Eidsvold, in Norway, and the bill was purchased by his agent in Minnesota, who forwarded it to him. He received it February 27, 1877, and retained it in his possession until April 12th following, when he presented it to the bank for payment, which was refused. He then caused the bill to be protested by a notary of Norway for non-payment. The drawers were notified of its non-payment by letter from the plaintiff, which they received at Red Wing as early as May 15, 1877, and also by the original certificate of protest of the notary, which, with a translation, was at that time shown to one of them by the agent of the plaintiff, to whom the document was sent for that purpose.

It appears from the findings of the court below that the drawers had no money to their credit with the Christiania bank when the bill was drawn, but depended for its acceptance and payment upon advices to the bank by Skow, Peterson, Isberg & Co., bankers, at Chicago. That firm failed and made an assignment on the twenty-first of March, 1877. It had, however, from February 28th to that date, inclusive, to its credit with the bank, money sufficient to pay the bill, but no portion of it had been set apart for that purpose, and it has been since paid to the assignee of the firm. On the fifteenth of February, 1877, the drawers wrote to the payee a letter stating that, fearing their draft might not be paid, they had caused a cable dispatch to be sent to Christiania directing payment, but there was no evidence that the bank received such a dispatch, if sent, or gave them any credit on it.

Eidsvold, at or near which the plaintiff resided, is distant about 50 miles from Chris-

tiania, the place where the bank was situated, and between them there was daily communication by mail and by railway.

In proof of the presentment of the bill to the bank and the latter's refusal to pay the same, a copy of the notary's certificate of protest was given in evidence by the plaintiff, the defendants having stipulated for the admission of a copy with the like effect as the original, which was needed elsewhere. Subsequently the defendants themselves produced the original for the purpose of showing its character, insisting, at the time, that it had no authenticity as the act of the notary, and was not, therefore, competent evidence of the presentation and non-payment of the bill. To meet the objection of unnecessary delay in presenting the bill the plaintiff gave in evidence, against the objection of the defendants, the deposition of a lawyer of Norway as to the law of that country respecting the presentation of bills of exchange for payment. Exception was taken to the ruling of the court in its admission. It appeared, from the deposition, that by the law of Norway, the holder of a foreign bill of exchange, payable at sight, is allowed a year after its date within which to present it to the drawee for payment; and that the drawer is not relieved from liability, if the presentation be not made within a year, unless he can prove that owing to the delay he has suffered a loss in his accounts with the drawee. Evidence was offered by the defendants to show that the plaintiff, himself, had admitted his negligence in presenting the bill, but on objection of counsel it was excluded, to which ruling an exception was taken. The court found in favor of the plaintiff for the full amount of the bill, and judgment having been entered on the finding, the case was brought to this court for review.

Chas. E. Flandrau, for plaintiffs in error.
E. C. Palmer, for defendant in error.

Mr. Justice FIELD, after stating the facts in the foregoing language, delivered the opinion of the court.

The certificate of the protest of the bill of exchange by the notary in Norway was properly received in evidence. It is in due form, and bears what purports to be the seal of the notary. The seal, it is true, is impressed directly on the paper by a die with which ink was used. This is evident from inspection of the original, which has been transmitted to us from the court below for our personal examination. The use of wax, or some other adhesive substance upon which the seal of a public officer may be impressed, has long since ceased to be regarded as important. It is enough, in the absence of positive law prescribing otherwise, that the impress of the seal is made upon the paper itself in such a manner as to be readily identified upon inspection.

The language used in *Pillow v. Roberts*, reported in 13 How. 472, as the sufficiency of a seal of a court impressed upon paper instead of wax or a wafer, is applicable here. Said the court, speaking by Mr. Justice Grier:

"Formerly wax was the most convenient and the only material used to receive and retain the impression of a seal. Hence it was said: '*Sigillum est cera impressa; quia cera, sine impressione non est sigillum.*' But this is not an allegation that an impression without wax is not a seal, and for this reason courts have held that an impression made on wafers or other adhesive substances capable of receiving an impression, will come within the definition of '*cera impressa.*' If, then, wax be construed to be merely a general term, including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine, now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident, or intention than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it."

Here there is no difficulty in identifying the seal. The impression, which is circular in form, has within its rim the words, "Notarial Seal, Christiania." Besides, the court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world. We thus recognize the seal to the document in question as that of the notary in Norway, and as such authenticating the certificate of protest and entitling it to full faith and credit. *Greenl. Ev.* § 5; *Story, Bills*, § 277; *Townsley v. Sunrall*, 2 Pet. 179; *Chanoine v. Fowler*, 3 Wend. 173; *Carter v. Burley*, 9 N. H. 559, 568; *Holliday v. McDougal*, 20 Wend. 81. The certificate being admitted, proved the presentation of the bill to the bank on the twelfth of April, 1870, and its non-payment. That this presentation was made within the period allowed by the law of Norway appears from the deposition of a lawyer of that country, taken under a commission from the court. That law allowed a year after the issue of the bill for its presentation; and on the question of timely presentation the law of the place where a foreign bill of exchange is payable governs, and not the law of the place where it is drawn. In giving a bill upon a person in a foreign country, the drawer is deemed to act with reference to the law of that country, and to accept such conditions as it provides with re-

spect to the presentment of the bill for acceptance and payment. Thus, where days of grace on bills are different in the two countries, the rule of the place of payment must be followed. In England and the United States three days of grace are usually allowed; in France there are none, and in some places the number of days varies from three to thirty. Whatever is required by law to be done at the place upon which the bill is drawn, to constitute a sufficient presentment either in time or manner, must be done according to that law; and whatever time is permitted within which the presentment may be made by that law, the holder may take without losing his rights upon the drawer, in case the bill is not paid. So, also, if the bill be dishonored, the protest by the notary must be made according to the laws of the place. It sometimes happens that the several parties to a bill, as drawers of indorsers, reside in different countries, and much embarrassment might arise in such cases if the protest was required to conform to the laws of each of the countries. One protest is sufficient, and that must be in accordance with the laws of the place where the bill is payable.

In this case, the bill having been protested, the drawers were notified of its dishonor by letter from the payee, received by them on the fifteenth of May following, and also by personal delivery at about the same time of the original certificate of the protest, with a translation of it into English, to one of the drawers by an agent of the payee, to whom they were transmitted for that purpose. No question is made that this notice was not sufficient to charge the drawers. The testimony of the lawyer of Norway as to the law of that country was admissible under the statute of Minnesota, which provides that "the existence and the tenor or effect of all foreign laws may be proved as facts by parol evidence, but if it appears that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law that is not accompanied by a copy thereof." The general rule as to the proof of foreign laws is that the law which is written, that is, statute law, must be proved by a copy properly authenticated; and that the unwritten law must be proved by the testimony of experts, that is, by those acquainted with the law. *Ennis v. Smith*, 14 How. 426. But this rule may be varied by statute, and that of Minnesota leaves it to the discretion of the judge to require the production of a copy of the written law when the fact appears that the law in question is in writing. The discretion of the judge here was not improperly exercised, even if in such case his action would be the subject of review, as contended by counsel.

The admission of the payee that he had been negligent in presenting the bill was properly excluded. His negligence in that respect could not have affected his legal

rights, if in point of fact the bill was presented within the time allowed by the laws of Norway.

We have thus far assumed that the drawers were entitled to notice of the presentation and non-payment of the bill. But it may be doubted whether such was the fact. They had no funds with the bank in Norway when the bill was drawn or at any other time, and they relied for its payment upon the advices of third parties. Although such third parties had funds at the bank after the bill had been received by the payee in Nor-

way, there is no evidence that they ever advised the bank to pay the bill out of such funds. It is found by the court that the bank never set apart any portion of them to meet the bill. The cable dispatch of the drawers, of which the letter of February 15th speaks, if it ever reached the bank, does not appear to have induced it to give them any credit. In the most favorable view, therefore, which could be taken of the position of the drawers, we see nothing which relieves them from liability.

The judgment is, therefore, affirmed.

PEOPLE v. WOOD.

(30 N. E. 243, 131 N. Y. 617.)

Court of Appeals of New York. March 1, 1892.

Appeal from court of oyer and terminer, Warren county.

Indictment against Joseph Wood for murder. From a judgment of the court of oyer and terminer, finding the defendant guilty, defendant appeals. Affirmed. For former report, see 27 N. E. 362.

James M. Whitman, for appellant. Lyman Jenkins, Dist. Atty. (Charles R. Patterson, of counsel), for the People.

FINCH, J. Four unfounded objections, admitting of brief and easy answers, and in no respect justifying the delay of this appeal, disclose themselves from a printed case of 1,400 pages prepared at the expense of the county of the trial. The prisoner's counsel raises no question of fact. He concedes explicitly that upon the proof the verdict is not to be assailed, either as against the evidence or as unsupported by it, and rests his argument upon what he claims to have been errors of law. Three of these are exceptions to the decision of the court upon a challenge of individual jurors in cases where the challenge was sustained, and the jurors rejected. We have looked at the rulings to see whether any injustice has been done to the prisoner of which we ought to take notice. The juror Balcom was rejected because he had an opinion as to the guilt or innocence of the prisoner which he described as fixed, and of long standing, and which would influence his conduct in the jury-box. Complaint is made that the juror was rejected without opportunity for cross-exam-

ination by the prisoner's counsel. It does not at all appear that the right was either asserted or denied, or in any manner sought to be exercised. The jurors Dickinson and Stewart were rejected because they had conscientious scruples against rendering a verdict of guilty in a capital case. They brought themselves fully within the provisions of section 377 of the Code of Criminal Procedure. The juror Cooke was rejected on account of a present opinion upon the question of guilt or innocence. Taking his statement as a whole, his rejection appears to have been proper. The fourth objection is that, while the indictment charges the commission of the crime in the town of Stony Creek, in the county of Warren, and while the proof shows the offense in the town alleged, it does not show that such town was in the county of Warren. No such objection was raised at the trial, when the omission could have been obviated. It made its first appearance after the verdict, and on a motion for a new trial on the minutes. But, if made when it should have been, it is a conclusive answer that the court will take judicial notice of the fact that the town of Stony Creek is in the county of Warren. *People v. Breese*, 7 Cow. 429; *Vanderwerker v. People*, 5 Wend. 530; *Chapman v. Wilber*, 6 Hill, 475. We have examined the testimony sufficiently to be satisfied that the verdict was just. The prisoner admitted the fact of the killing, and his counsel approved and stood upon the admission. The defense of insanity was fairly submitted to the jury, and it was hardly possible that the verdict should have been different. The judgment must be affirmed.

All concur.

COMMONWEALTH v. KING.

(22 N. E. 905, 150 Mass. 221.)

Supreme Judicial Court of Massachusetts.
Hampshire. Nov. 30, 1889.

Exceptions from superior court, Hampshire county; BRIGHAM, Judge.

This was an indictment charging the defendant with having run a steam-boat for the conveyance of passengers on the Connecticut river at South Hadley, in said county, and landing and receiving said passengers at said South Hadley without having obtained any license from the selectmen of said town of South Hadley, as is required by Pub. St. c. 102, §§ 120-122, which authorize the licensing of persons to run steam-boats on waters not within the maritime jurisdiction of the United States, and punish by fine the running of such boats without first obtaining a license. Before the jury were impaneled the defendant duly moved to quash the indictment against him for the following reasons: *First*, because the Connecticut river is a navigable river, and is not a lake, pond, or water, covered by chapter 102, §§ 120-122, Pub. St.; *secondly*, because said indictment, and each count thereof, is bad for duplicity, inasmuch as two distinct and separate offenses and crimes are charged in each count; *thirdly*, because it is not alleged in said indictment, or in any count thereof, that said defendant was a common carrier at the time of the commissions of the offenses complained of; *fourthly*, because it is not alleged in said indictment, or in any count thereof, that said defendant carried said passengers as aforesaid for hire; *fifthly*, because no offense or crime known to the laws of the land is fully and plainly, substantially and formally, set out or charged in said indictment, or in any count thereof. The court overruled the motion, and the defendant excepted.

At the trial there was evidence tending to show that upon the dates alleged in the indictment the defendant was in possession of a certain steam-boat, and carried persons from the city of Holyoke, and landed them at a point about one and one-fourth miles above Holyoke dam, on the east side of the river alleged to be within the limits of said town of South Hadley; that the defendant also took persons from said point, and carried them in said steam-boat to said Holyoke; that on June 24, 1888, the defendant collected fares of 25 cents from each person on board said steam-boat, which was for the "round trip," including the right to enter the grove leased by the defendant, and to which grove said persons went from the landing place; that the place of landing was at the water's edge, several rods from "high-water mark," on the easterly or South Hadley side of said river; that the land on the opposite side of said stream or river from the said place of landing was in the city of Northampton; that, for the purpose of proving that said point at which said boat landed was in said South

Hadley, the statute incorporating South Hadley was put in evidence, and also a map of the state of Massachusetts, purporting to be made "by order of the legislature in 1844, Simeon Borden, superintendent," was introduced in evidence, subject to the defendant's objection; that several witnesses who had no special knowledge of the boundary line, but who were residents of the vicinity, were asked whether they knew in what town the said point of landing on the east side of the river was; each answering in the affirmative, they were asked and permitted to state that the place was in South Hadley, and the defendant excepted. It appeared that there were two dams erected between Hartford, in the state of Connecticut, and said Hadley, including the dam at Holyoke; that before said dam was built, in 1847, boats were accustomed to pass through the canal around the falls at South Hadley, to points further up the stream, to all towns above. It was admitted at the trial that said defendant had not obtained any license from the selectmen of said South Hadley to run said steam-boat. This was substantially all the evidence in the case. After the evidence was all in, the defendant asked the court to rule and instruct the jury as follows: (1) That the Connecticut river, between Springfield and Hadley, is not a lake, pond, or water, covered by chapter 102, §§ 120-122, Pub. St. (2) That the Connecticut river, between Springfield and Hadley, is within the maritime jurisdiction of the United States. (3) That there is no evidence that the Connecticut river between Springfield and Hadley is not within the maritime jurisdiction of the United States. (4) That there is no evidence that the defendant ran a steam-boat for the conveyance of passengers. (5) That there is no evidence that the defendant landed or received passengers within the town of South Hadley. (6) That, on the whole evidence, the defendant cannot be convicted. (7) That said statute, if it applies to the Connecticut river between Springfield and Hadley, is unconstitutional and void. But the court refused so to rule in form or substance, and upon the whole case the court gave full and appropriate instructions to the jury, to which no exceptions were taken save to the refusals to instruct as above stated. The jury returned a verdict of guilty, and the defendant excepts.

George M. Stearns and J. B. O'Donnell, for defendant. A. J. Waterman, Atty. Gen., and H. A. Wyman, Asst. Atty. Gen., for the Commonwealth.

FIELD, J. The only exceptions argued are the exception to the admission of the map in evidence, and the exceptions to the refusal of the court to rule "that there is no evidence that the Connecticut river, between Springfield and Hadley, is not within the maritime jurisdiction of the United States," and to the refusal of the court to quash the indictment, "because it is not alleged in said indictment, or in any count thereof, that said defendant carried said passengers as aforesaid for hire."

The other exceptions taken at the trial must be regarded as waived. If there was a map of the towns and counties of the commonwealth published by authority of the legislature, pursuant to chapter 69 of the Resolves of the year 1844, it was some evidence of the boundaries of the town of South Hadley. See *Worcester v. Northborough*, 140 Mass. 397, 5 N. E. Rep. 270. The objection taken in argument is that the map was allowed to prove itself, and that it was not shown to have been published by legislative authority. Whether this was a genuine map, published by order of the legislature, as it purported to be, was a preliminary fact, of which, if disputed, some evidence must have been exhibited to the court before the map could be admitted in evidence; but it does not appear that this fact was disputed, or that the objection to the admission of the map was taken on this ground. If such an objection had been taken, the commonwealth might perhaps have been able to furnish evidence that the map was what it purported to be. The only objection stated in the exceptions is that the map "was introduced in evidence subject to the defendant's objection," and this must be considered, not as an objection that sufficient evidence had not been introduced to show that the map was what it purported to be, but as an objection that a map such as this purported to be was not evidence of the location of a boundary line of a town of the commonwealth.

In *The Daniel Ball*, 10 Wall. 557, 563, it is said in the opinion that "those rivers must be regarded as public navigable rivers in law which are navigable in fact; and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are, or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, within the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition, by themselves or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries, in the customary modes in which such commerce is conducted by water." Pub. St. c. 102, §§ 120-122, were first enacted in 1876, (St. 1876, c. 100.)

Then, as well as now, the statutes of the United States, regulating steam-vessels, were contained in title 52 of the Revised Statutes of the United States. Section 4400 of these statutes provides that "all steam-vessels navigating any waters of the United States, which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, yessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title." See, also, St. U. S. 1882, c. 441; 22 St. at Large, 346. This title contains careful provisions for the inspection of steam-vessels, and for regulating the number of passengers which they are permitted to carry. The statutes of Massachusetts were intended to regulate steam-boats used for the conveyance of passengers which were not subject to regulation by congress, because they were not used in navigating waters of the United States. We think that the superior court might take judicial notice that the Connecticut river, above the dam at Holyoke, does not, either by itself or by uniting with other waters, constitute a public highway over which commerce may be carried on with other states or with foreign countries, although, if the court had entertained any doubt on the subject, it might have required evidence to be produced. It is well known that the waters of the Connecticut river, at the place where it is alleged that the defendant's steam-boat was employed, can be used by vessels only for the transportation of persons and property between different places in Massachusetts. They are therefore waters not within the maritime jurisdiction of the United States. *Veazie v. Moor*, 14 How. 568; *The Montello*, 11 Wall. 411, 20 Wall. 430; *Miller v. Mayor, etc.*, 109 U. S. 385, 395, 3 Sup. Ct. Rep. 228.

The objection to the form of the indictment cannot prevail. The indictment follows the words of the statute. The word "passengers" is used in the statute and in the indictment in its ordinary sense, and has the same meaning in one as in the other. If, in order to constitute a passenger, a person must be carried for hire,—upon which we express no opinion,—there was evidence that at least on one occasion, which was described in the indictment, the defendant collected fares of the persons carried. Exceptions overruled.

CAREY et al. v. REEVES et al.

(26 Pac. 951, 46 Kan. 571.)

Supreme Court of Kansas. June 6, 1891.

Error from superior court, Shawnee county; W. C. Webb, Judge.

Carey and Bray commenced on October 26, 1883, this action to quiet title to a quarter section of land in Shawnee county. They alleged ownership and actual possession.

The following are the legal conclusions: "The questions of law in this action are: *First.* Was the affidavit of Wilson Shannon, filed in the clerk's office of the district court January 17, 1861, described in conclusion of fact No. 4, in the action commenced by Reuben H. Farnham against said James McCamman, for the purpose of reforming and foreclosing the mortgage hereinbefore described, sufficient in law to authorize service by publication in said action against the defendant, James McCamman, under section 79, Code of Procedure 1859, (Compiled Laws of 1862, c. 26?) *Second.* Was the affidavit of J. T. Cummings, publisher of the newspaper, sufficient in law to show that the publication notice was made 'six consecutive weeks?' as required by law in such actions? *Third.* If both these propositions are found in the affirmative, then the plaintiffs must fail in this action. If either of these propositions are solved in the negative, then the court did not have jurisdiction to decree a sale of the land in controversy described in plaintiffs' petition, and the plaintiffs are entitled to recover in this action. *Fourth.* That the issue of law is against the plaintiffs and in favor of the defendants." To the conclusions of law in favor of the defendants and against the plaintiffs the plaintiffs excepted, and bring the case here. *G. C. Clemons*, for plaintiffs in error. *H. H. Harris*, for defendants in error.

HORTON, C. J. The United States issued a patent to the land in controversy to James McCamman on the 1st day of June, 1860, and the findings are to the effect that the plaintiffs are the owners by conveyances from McCamman, unless the judgment of October 9, 1861, of Reuben H. Farnham against James McCamman and the sale of the land thereunder divested McCamman of his title. When this case was here before, (Carey v. Reeves, 32 Kan. 718, 5 Pac. Rep. 22,) Mr. Justice VALENTINE, speaking for the court, said: "When this affidavit [for publication service] was filed, is not shown. It is alleged that the action was commenced on January 17, 1861, and the affidavit shows that the petition was filed 'on the — day of January, 1861;' but there is nothing to show when the affidavit was in fact filed. If it was filed prior to January 29, 1861, the region of country known as 'Pike's Peak,' or a portion thereof, was in Kansas; but if the affidavit was filed after January 29, 1861, then such region was not in Kansas, and no part thereof was in Kansas. * * * We suppose that when the plaintiffs in this action say that the foreclosure action was commenced on January 17, 1861, they mean that the petition was filed on that

day. But when the service was made is not shown; nor is it shown when the judgment was rendered. It may have been in 1861, or in 1862, or in some subsequent year. We cannot say that the court below erred in deciding against the plaintiffs in this particular." At the last trial it was shown, and the court expressly found, that the affidavit for publication was filed on the 17th day of January, 1861. This was while Kansas existed as a territory and before its admission as a state into the Union. It was also shown, and expressly found at the last trial, that on January 17, 1861, and for some time previous thereto, James McCamman resided in Denver, and within the territory of Kansas, and continued to reside there after the 29th of January, 1861, when Kansas was admitted as a state. The former decision of this court in this case at its July term, 1884, (32 Kan. 718, 5 Pac. Rep. 22,) is not decisive or controlling, because the facts now presented in the record are materially different from those which we considered at the time the former opinion was handed down. The affidavit for publication stated that the defendant, James McCamman, "has removed from the said county of Shawnee, and now resides in that region of country known as 'Pike's Peak,' and that service of summons cannot be made on him within this territory." At the time that Kansas was organized as a territory its western boundary extended "to the eastern boundary of the territory of Utah, on the summit of the Rocky mountains." We must take judicial notice of where "the region of country known as 'Pike's Peak'" existed on the 17th of January, 1861. *State v. Teissedre*, 30 Kan. 476, 2 Pac. Rep. 650; *State v. Baldwin*, 36 Kan. 1, 12 Pac. Rep. 318; *Railroad Co. v. Burge*, 40 Kan. 736, 21 Pac. Rep. 589. Lippincott's Pronouncing Gazetteer of the World, (published in 1856,) referring to Kansas, said: "It is a territory of the United States of America, formed by an act of congress passed May, 1854, lying between 37° and 40° N. lat., and between about 94° 30' and 107° W. lon. About 100 miles of the W. portion lies between 38° and 40° N. lat. It is bounded on the N. by Nebraska Territory; E., by the states of Missouri and Arkansas; S., by Indian Territory and New Mexico; and W., by New Mexico and Utah. This territory is about 630 miles in length from E. to W., and 208 in its widest, and 139 in its W. part, including an area of nearly 114,798 square miles. The Rocky mountains separate it from Utah, and the Missouri river forms a small part of the N. E. boundary." The New American Cyclopædia (volume 10, p. 103, published in 1860) described Kansas as follows: "It is a territory of the United States, lying between lat. 37° and 40° N. and long. 94° 40' and 106° 50' W., bounded N. by the territory of Nebraska, E. by the state of Missouri, S. by the Indian Territory and New Mexico, and W. by New Mexico and Utah. With the exception of the N. E. corner of the territory, where the boundary line follows the irregular course of the Missouri river, its shape is that of a parallelogram as far W. as long. 103°. The boundary then follows this meridian N. to lat. 38°,

and runs W. along that parallel to long. $106^{\circ} 50'$; thence N. to about lat. $39^{\circ} 20'$, E. to long. $105^{\circ} 40'$, and finally N. again until it meets the Nebraska frontier. Length, E. and W., 550 M.; breadth, E. of long. 103° , 208 M.; W. of that line, 139 M.; area, 114,798 Sq. M." The *Encyclopædia Britannica*, (volume 23, p. 4796,) in describing the Rocky mountains, says: "Gray's peak (14,341 feet) is the highest point in this range, (the front, or Colorado range,) but, although on the continental divide, it is too far west to be visible from the plains. This divide, which separates the Atlantic water from those of the Pacific, follows the front range as far as Gray's peak, where it is deflected westward for 20 miles to the Sawatch range, which it follows for about 75 miles. In this deflexion the divide passes between Middle and South parks, the lowest pass in this part being that called the 'Tennessee,' (10,418 feet,) which leads from the head of the Arkansas to the Grand River branch of the Colorado. The Sawatch range is one of the highest and best marked chains in the Rocky mountains. It lies west of the head of the Arkansas; and its dominating peaks, along the whole range, exceed 14,000 feet. The most northerly of these, the Mountain of the Holy Cross, (14,176 feet,) was so named on account of the existence on its eastern flank of a large snow-field lying in two ravines which intersect each other at right angles, in the form of a cross, and which in summer is conspicuously visible from a great distance. The highest point is Mount Harvard, (14,375 feet,) and the passes range from 12,000 to 13,000 feet. The continental divide follows the Sawatch range to its southern end, in lat. $38^{\circ} 20'$, and then runs in a south-westerly direction for about 75 miles, over a high region without any distinctly marked range. Here it turns, and, running southeasterly, follows the crest of the San Juan range, which at many points rises above 13,000 feet." Not only as a matter of fact is the summit of the Rocky mountains (the western boundary of the territory of Kansas) a long distance west of Pike's Peak, but it was so generally mentioned in the gazetteers, geographies, and encyclopædias in general use in 1861.

Therefore "the region of country known as 'Pike's Peak'" on the 17th of January, 1861, and until Kansas was admitted into the Union, on January 29, 1861, was within the territory of Kansas, and generally known to be within the territory of Kansas. The affidavit for service by publication showed upon its face that James McCamman had removed from the county of Shawnee and resided "in the region of country known as 'Pike's Peak.'" That region was within, not without, the territory of Kansas at the date of the filing of this affidavit; therefore McCamman was not a non-resident of the territory of Kansas at the time the service by publication was made; therefore such publication was void,—that is, it was invalid as a constructive service, because the affidavit for publication affirmatively showed that the defendant resided within the territory of Kansas, and it was not stated that he had departed from the territory or the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or to keep himself concealed. It has already been decided by this court that it cannot be shown in a collateral attack that the affidavit for publication is untrue. *Ogden v. Walters*, 12 Kan. 282; *Rowe v. Palmer*, 29 Kan. 337; *Carey v. Reeves*, 32 Kan. 718, 5 Pac. Rep. 22. But that is not this case. In this case the affidavit is insufficient upon its face. It does not state facts to authorize any publication service; therefore no personal or constructive service was ever had upon McCamman prior to the rendition of the judgment against him on the 9th day of October, 1861. *Comp. Laws*, c. 26, tit. 4, 5, §§ 52, 78, 79. See, also, title 11, § 385, same chapter. Upon the findings of fact the judgment must be reversed, and the cause remanded with direction to the district court to render judgment for the plaintiffs and against the defendants. This direction will not prevent the defendants from recovering any taxes paid by them, if any have been paid, while the land has been in controversy in any of the courts of this state. *Sess. Laws* 1876, c. 34, § 149, par. 7004, Gen. St. 1889; *Wood v. Grubbe*, 31 Kan. 69, 1 Pac. Rep. 277. All the justices concurring.

WETZLER v. KELLY et al.

(3 South. 747, 83 Ala. 440.)

Supreme Court of Alabama. Feb. 21, 1888.

Appeal from circuit court, Geneva county; J. M. Carmichael, Judge.

This was a claim suit brought in the magistrate's court originally. S. A. Wetzler sued one J. L. Wright in the justice of the peace court on a waive note, and obtained a judgment against him, for which an execution issued, and was duly levied on the cotton which is now the subject of the present claim suit. Upon the levy being made upon the cotton which was in the possession of the defendant in execution, the claimants, G. W. Kelly & Co., appellees in the present appeal, interposed a claim to the cotton so levied upon. Whaley was shown to be the authorized agent of the claimants, G. W. Kelly & Co. Upon the evidence, which is sufficiently fully set out in the opinion of the court, the plaintiff asked the court to charge the jury in writing, "that, if they believed the evidence, they must find for the plaintiff." The court refused to give the said charge, and the plaintiff excepted. The claimants asked the court to give the following charge, which was in writing: "That, if they believed the evidence, they must find for the claimants." The court gave the charge, against the objection of the plaintiff, and the plaintiff duly excepted. The giving of this charge at the request of the claimants, and the refusal to give the charge requested by the plaintiff, are here assigned as error.

Marcellus E. Milligan, for appellant. F. J. Milligan and H. L. Martin, for appellees.

STONE, C. J. It is manifest that the present judgment must be reversed, unless the facts which occurred when Whaley visited Wright in September, or the act "to amend section one of an act entitled 'An act to amend section 3341 of the Code,'" works a change of the rights of the parties. The statute was approved February 28, 1887 (Sess. Acts, 150). Code 1886, § 3004; *Iron-Works Co. v. Renfro*, 71 Ala. 577; *Marks v. Robinson*, 82 Ala. 69, 2 South. 292. Wetzler, the appellant, claimed a lien on the cotton in controversy, under an execution issued on a judgment against one Wright, and which was levied on the cotton as Wright's in October, 1886. The cotton when levied on was on the land on which it was grown, the home of Wright, the defendant in execution. The cotton had been grown by Wright. Kelly & Co. interposed a statutory claim to the property, by affidavit filed that they had a just claim to it. This claim was interposed October 16, 1886, after the levy of Wetzler's execution. Kelly & Co. had a mortgage on the crop to be grown by Wright in 1886, which was dated in January of that year. It is common knowledge that crops of cotton are not plant-

ed in this state until after that time. The crop not being planted when the mortgage was made to Kelly & Co., they were without legal title to it, and could not maintain their claim at law, by mere force of the mortgage itself. *Iron-Works Co. v. Renfro*, 71 Ala. 577; 3 Brick. Dig. 776, §§ 7, 8; *Marks v. Robinson*, 82 Ala. 69, 2 South. 292; *Jackson v. Bain*, 74 Ala. 328.

The testimony of Whaley neither proved, nor tended to prove, a delivery of the cotton to him as the agent of the claimants. He did not take possession, nor was it contemplated that he should do so. The remark of Wright referred alike to the ungathered crop, and to that which had been gathered. He said: "You have a mortgage. All that is yours; you can have it," referring to the crop. Whaley instructed Wright to haul the cotton to the gin, have it ginned, and bring it to Newton; but the cotton never came into the actual possession of Whaley, and was allowed to remain in possession of Wright, defendant in execution and mortgagor. While so in his possession, the levy of Wetzler's execution was made, out of which the present contest grew. The remark of Wright had reference alone to the interest the mortgage secured to Kelly & Co., and neither changed the status of the property, nor was it intended to do so. Nor can the statute, enacted after the present claim suit was instituted, affect the rights of the parties. Code 1886, § 3004. As we have shown, when the claim was interposed by Kelly & Co., October 16, 1886, they were without a title which would avail them in this character of suit. We need not inquire whether it was within the pale of legislative power to heal this imperfection by retroactive enactment. *Trust Co. v. Boykin*, 38 Ala. 510; *Steamboat Co. v. Barclay*, 30 Ala. 120. It is sufficient for the wants of this case that in the act approved February 28, 1887, (Sess. Acts 150,) no intention is shown to give it a retrospective operation. We feel bound, therefore, to hold that that statute can exert no influence in the decision of this case. 2 Brick. Dig. 462, § 31; *Farris v. Houston*, 78 Ala. 250; *Warten v. Matthews*, 80 Ala. 429; *Security Co. v. Board, etc.*, 81 Ala. 110, 1 South. 30. As a rule, parties can maintain or defend suits only on the title they have when the suit is commenced. In what we have said, it is not our intention to declare that the legislature may not provide a new remedy, which shall apply to existing rights, as well as to those afterwards to accrue. *Anonymous*, 2 Stew. 228; *Bartlett v. Lang*, 2 Ala. 401; *Paschall v. Whitsett*, 11 Ala. 472; *Holman v. Bank*, 12 Ala. 369. What we do decide is that when a suit is instituted, or a defense interposed, which is at the time unauthorized by the law, a subsequent statute giving such remedy does not operate on the existing suit, especially when it does not provide it shall so operate. Reversed and remanded.

SWALES v. GRUBBS et al.

(25 N. E. 877, 126 Ind. 106.)

Supreme Court of Indiana. Nov. 19, 1890.

Appeal from circuit court, Dearborn county; W. H. BANBRIDGE, Judge.

Hugh D. McMullen and John K. Thompson, for appellant. *N. S. Givan and Roberts & Stapp*, for appellees.

MITCHELL, J. This was a suit by Francis Swales against the heirs and personal representatives of James Grubbs, deceased. The purpose of the action was to obtain judgment against the decedent's estate upon certain promissory notes, alleged to have been executed by the latter to the plaintiff in his life-time, and to set aside certain conveyances alleged to have been fraudulently made by the decedent, in his life-time, to his children, who are made defendants. It was found that the decedent did not execute the note sued on, and a judgment for the defendants followed, necessarily. It is contended that as only one of the defendants pleaded *non est factum*, the execution of the notes was admitted, and that the finding to the contrary was therefore outside of the issue. An answer appears in the record which purports to have been filed by all of the defendants except the administrator, in which the execution of the notes is denied. It is verified by only one of the defendants, and it is now insisted that, as to all the others, the execution of the notes was admitted. The administrator answered, practically admitting all that was alleged in the complaint, and averring that he had allowed the claim. It has been held that a joint answer by two defendants, who are joint makers of a promissory note in suit, alleging a material alteration of the instrument, which is verified by the affidavit of only one of them, is sufficient only to put the plaintiff upon proof of the execution of the note by the one thus verifying the answer: *Feeney v. Mazelin*, 87 Ind. 226. This decision was made in an action where the note was the foundation of the complaint, and where the makers were parties in court. In the present case, the action, so far as it affects the appellees, is not founded on the notes, nor is the maker of the instruments a party. Formerly, the statute read: "Where a writing, purporting to have been executed by one of the parties, is the foundation of or referred to in any pleading it may be read in evidence on the trial of the cause against such party without proving its execution, unless its execution be denied under oath." Under this statute it was uniformly held that neither the personal representative nor the heir was within the language or spirit of the statute. *Riser v. Snoddy*, 7 Ind. 442; *Mahon v. Sawyer*, 18 Ind. 73; *Barnett's Adm'r v. Union*, 28 Ind. 254; *Wells v. Wells*, 71 Ind. 509. In the Revision of 1881, (section 364,) the language of the statute is more comprehensive, and provides that "where a pleading is founded on a written instrument, or such instrument is therein referred to, * * * such instrument * * * may be read in evidence on the trial of the cause without proving its exe-

cution unless its execution be denied under oath; * * * but executors, administrators, or guardians need not deny the execution of an instrument," etc. The notes, although referred to in the complaint, are not the foundation of the action; and while, possibly, it may have been necessary that the execution of the instruments therein referred to should have been denied under oath, (*Belton v. Smith*, 45 Ind. 291; *Carver v. Carver*, 97 Ind. 497-509,) it was not necessary that all the heirs should verify the answer denying that their ancestor and grantor executed the notes referred to in the complaint. Where an instrument is the foundation of or is referred to in a pleading in an action against parties other than those who are alleged to be parties to it, joint answers by all or any number of the defendants, denying its execution, verified by the oath of any one of the defendants, puts the plaintiff upon proof of the execution of the instrument, as against all those who join in the answer. Indeed, we can see no substantial reason for requiring all of a number of joint makers of an instrument, who join in a plea of *non est factum*, to verify the plea; but we decide nothing upon that subject now. The decisions of this court seem to require that all of those who are parties to an instrument which is the foundation of a pleading should verify a plea denying the execution of the instrument in order to require proof of its execution. We are not willing to extend this rule to heirs or other persons not parties to the instrument.

During the progress of the trial, the plaintiff below introduced the original deeds in evidence, copies of which had been filed with the complaint. After the deeds had been thus introduced, the court permitted witnesses to compare the signature of James Grubbs, as it appeared on these several deeds, with his signature on the notes in suit, and, from the comparison thus made, to give their opinion as to the genuineness of the signature on the notes. By introducing the original deeds in evidence for the purpose of proving what had been charged in the complaint, viz., that James Grubbs had conveyed certain lands in severalty to the defendants, the appellant must be held to have admitted the genuineness of the signatures to those instruments; and the rule is established by numerous decisions that a comparison may be made between a signature that is admitted by the opposite party to be genuine, and is already in evidence for some other purpose, and has thus become subject to examination by the jury, and the signature whose genuineness is in question. *Walker v. Steele*, 121 Ind. 436, 22 N. E. Rep. 142, 23 N. E. Rep. 271, and cases cited; *Shorb v. Kinzie*, 100 Ind. 429-431. The case was one of equitable cognizance, and was so regarded and tried by the court, although a jury was called to answer certain questions propounded as advisory to the court. It was a disputed question whether or not the notes sued on had been executed on Sunday. The court charged the jury that certain dates, being the dates fixed in the notes, each occurred on the first day of the week, commonly called "Sunday." Courts take judicial notice of

the "days on which fall Sundays and holidays," and it was, therefore, proper to charge the jury that certain dates fell on Sunday. 1 Whart. Ev. § 335. The jury were, however, called for the purpose of answering certain questions of fact propounded to them by the court. In chancery cases, the province of the jury is to find facts, and not to administer equities in the light of legal rules. This is for the court, when the facts are ascertained. It is enough, therefore, to say that in a case, like the present, of equitable cognizance, general instructions as to the law applicable to the facts of the case are not proper,

and a available error cannot be predicated upon the giving or refusal to give instructions of a general nature. In that respect, the rules which govern where the jury is required to find a special verdict are controlling. *Railway Co. v. Frawley*, 110 Ind. 18, 9 N. E. Rep. 594.

There are some other questions of minor importance that are suggested on the appellant's briefs. We have carefully considered all the questions, and find no error which would justify a reversal of the judgment. There was evidence which tends to sustain the finding. The judgment is affirmed, with costs.



FERRIS v. HARD et al.

(32 N. E. 129, 135 N. Y. 354.)

Court of Appeals of New York. Oct. 11, 1892.

Appeal from superior court of Buffalo, general term.

Action by Peter J. Ferris, as trustee of the city of Buffalo, against Samuel B. Hard and Margaret Hard and others, to foreclose a mortgage. From a judgment of the general term affirming a judgment for plaintiff, defendants appeal. Reversed.

Geo. Wadsworth, for appellants. Price A. Matteson, for respondent.

PECKHAM, J. This is an action to foreclose a mortgage executed by defendants Hard upon land owned by the defendant Mrs. Hard. The amended complaint sets forth the fact of the execution of the bond by defendant Samuel B. Hard to one Joseph Bork on the 10th of September, 1874, for the payment of \$10,000 in four equal payments of \$2,500 on the 10th of September in each of the years 1876, 1877, 1878, and 1879, with interest semiannually on all sums remaining from time to time unpaid. To secure such payments the amended complaint alleged that defendants Hard executed a mortgage bearing even date with the bond, and whereby they mortgaged the land described in the amended complaint. The mortgage was duly acknowledged and certified, and it was delivered to Bork on the day of its date. On February 1, 1876, Bork duly assigned the same to plaintiff, as trustee for the city of Buffalo, and the city is the real party in interest, and the sole and absolute owner of the bond and mortgage. It is then further averred that there is due and remaining unpaid the sum of \$10,000 and interest thereon from September 10, 1874, at 7 per cent. Further appropriate and ordinary allegations for the foreclosure of the mortgage were set forth in the pleading. The defendant Margaret Hard put in a separate answer, and set up in the way of an independent allegation that she was seised, on the 10th of September, 1874, and possessed in her own right, of the lands described in the amended complaint, and that on such day she executed a mortgage of the premises mentioned in the amended complaint, and delivered it under the circumstances and upon the consideration and for the purpose then set forth in her answer. She also therein alleged that she was, in September, 1874, informed that her husband was indebted to the firm of Lyon, Bork & Co. on account of money loaned by the firm to him, and she was requested to execute a mortgage to Joseph Bork, one of the firm, upon her land, for the purpose of securing such firm against loss by reason of such loans theretofore made and thereafter to be made to her husband, and she thereupon executed a mortgage upon lands described in the

amended complaint, and delivered it for such purpose. She believed the mortgage set forth in the amended complaint to be the same one thus executed and delivered. The answer further stated that the firm had since that time received moneys which should be applied on her husband's indebtedness to the firm, but there had been no accounting, and she denied any knowledge, etc., that the sum of \$10,000 was due. She then denied any knowledge or information sufficient to form a belief as to the truth of the allegations of the amended complaint, "not hereinbefore admitted, qualified, or denied, and therefore she denies the same, and each and every of such allegations." No question appears to have been raised as to the form of this denial. The action was referred to a referee for trial, and he reported in favor of the plaintiff for foreclosure and sale of the premises, to pay the full amount of \$10,000 and interest at 7 per cent. from the execution of the mortgage. Judgment was accordingly entered, and the same has been affirmed upon appeal at general term of the superior court of the city of Buffalo, and from the judgment of affirmance the defendants Hard have appealed to this court.

Upon the trial Samuel B. Hard was called as a witness on behalf of the defendants. It appears that his answer to the complaint also contained the allegation that the mortgage had been executed in order to secure the firm of Lyon, Bork & Co. for loans of money theretofore made and which might thereafter be made to the witness. Upon that trial he testified that nothing was ever said between him and Bork (with whom the whole transaction concededly took place) that the mortgage should stand for anything he owed, nor that it was given to secure any advances subsequently to be made by either of the firms or by Bork. Hard also testified that he told Bork that he would get his (Hard's) wife to execute a mortgage for \$10,000 on a part of the creek property, and that he would give Bork his own bond, and that Bork should sell the bond and mortgage. Here was a direct contradiction between the evidence of Mr. Hard and his sworn answer. It would seem that this contradiction was fully understood, and its serious character appreciated, by the defendants and their counsel. The record shows that the defendant Mrs. Hard offered to show by her husband, Mr. Hard, the witness then on the stand, that when his and Mrs. Hard's answers were drawn Mr. Hard informed the attorney who drew them that the bond and mortgage in question were executed and delivered to Bork to be sold by him for the benefit of Mr. Hard, as absolute securities, and not as securities for any amount then owing by him, or for advances thereafter to be made; and the attorney advised him there was no legal difference,—that the mortgagee would

have the right to hold them as such security, and that such was the legal effect of the transaction; and that, relying upon such advice, and supposing it to be correct, he and the defendant Margaret H. Hard answered the complaint as shown by their answers herein. The plaintiff objected to this evidence as immaterial, incompetent, and irrelevant, and the court sustained the objection, and the defendants excepted. We think this offer should have been allowed to be proved. As the evidence stood, a clear contradiction was shown between the evidence and the sworn answer of the witness, and any evidence which tended, if believed, to explain such contradiction in a manner consistent with the honesty of the witness, the defendants were entitled to give. If the plaintiff claims that the allegation in the answer was an admission of a fact which concluded the defendants so long as it remained a part of the pleading, one answer to such claim is that it comes too late. The plaintiff had permitted, without objection, the evidence to be given which showed the contradiction, and it was then too late to interpose with an objection which should preclude any explanation of the contradiction. This is upon common principles of fairness. If the plaintiff had a conclusive objection to the proof of any fact which would contradict the admission in the answer, he was bound to state it when the evidence in contradiction was offered, and he should not be permitted to acquiesce in its admission without the least objection, and subsequently present the objection when the witness desires to explain this contradiction; otherwise the plaintiff obtains the benefit of the contradiction and its effect as more or less of an impeachment of the rest of the evidence of the witness, while at the same time he secures the conclusive character of the admission in the pleading. This he should not be permitted to do.

Upon examination of the so-called "admission," we are of the opinion that it is not of such a character as to prevent, on that ground, evidence of an inconsistent fact. It admits no allegation of the complaint. That pleading made no allegation as to the consideration of the bond and mortgage. It alleged the execution of the bond in the penal sum of \$20,000, with the condition for the payment of \$10,000, as therein stated, and that the mortgage was executed as security for the bond. The answer of Mrs. Hard set up as an affirmative defense the execution of the mortgage for the purpose of securing the firm of Lyon, Bork & Co. for loans already made by that firm to her husband, or which might thereafter be made to him, and then stated the further facts necessary to secure an accounting, and denied the indebtedness of \$10,000. The only admission that could possibly be here claimed might consist in an admission of the execution of a mortgage upon the lands de-

scribed in the amended complaint. It, in fact, is nothing but an allegation of the execution of a mortgage, coupled with and forming part of the allegation as to its consideration. An answer may contain a direct or implied admission of some fact alleged in a complaint. The admission is implied when the fact alleged in the complaint is not denied in the answer. It is direct when the admission is made in terms. Either form of admission of an allegation contained in the complaint is conclusive upon a defendant so long as it remains in the pleading, and the plaintiff can point to it as conclusive proof of the truth of his allegation. *Paige v. Willett*, 38 N. Y. 28; *Robbins v. Codman*, 4 E. D. Smith, 315, 325. An allegation contained in an answer setting up an affirmative defense, which has no reference to and does not admit any allegation of the complaint, is of an entirely different nature. Such allegation is not an admission contained in a pleading, which is conclusive so long as it remains in the record. An admission which so concludes a party admits something already alleged or set forth in the pleading to which the pleading containing the admission is an answer. In this case the allegation as to the consideration of the mortgage admitted nothing as to that consideration which was set forth in complaint, for there was no allegation therein as to the consideration, and consequently the defendant was not concluded from showing a fact which was inconsistent with his allegation of the consideration, on the ground that he had admitted the consideration, and could not be heard to prove one inconsistent with such admission. The plaintiff could avail himself of the allegation as a declaration by defendant, and the defendant could explain it by other evidence so far as possible.

The question whether this evidence of the consideration, as testified to by Mr. Hard, was not objectionable on the ground that it changed substantially the defense (Code, § 723), is not now here. No such question was raised when the evidence was given. Subsequent to that time the defendants requested the referee to give them leave to amend the answers by striking out the allegations as to the consideration of the mortgage, and by inserting allegations in conformity to the testimony of defendant Hard. This was objected to by the plaintiff upon the ground that such amendment would change the issues, and also because the defendants had been guilty of laches. The court denied the motion for lack of jurisdiction, and not as discretionary. I suppose the motion was made so that the evidence already in without objection might be regarded by the referee as properly taken upon a question raised by the pleadings, and in order that he should not ignore the evidence as not material to any issue raised, although coming in without objection. The defendants, of course, desir-

ed the benefit of this evidence, if there was any, and therefore naturally sought to have it appear as material evidence offered upon an issue raised by their answers in the action. As there must be a new trial because of the error in refusing, under the circumstances already set forth, to allow the defendant Hard to explain the apparent contradiction in his evidence when compared with his answer, it is not necessary to decide whether the referee was or was not correct in his decision. The motion for leave to amend can be now made at special term, if defendants be so advised, before another trial is entered upon, and the court can decide the motion upon such terms as to it may appear to be just. The rules for permitting amendments to pleadings before trial, so as to have them present the case as the parties desire it, are very properly quite liberal, and there is no fear that the defendants will be treated with any injustice in such a matter.

It would be quite unfortunate for the parties if we should send this case back for a new trial without deciding the real question which appellants' counsel has so ingeniously argued. He says this mortgage was executed by the defendant Mrs. Hard as a surety for her husband's liability, and her contract must be judged according to the strictest rules governing contracts of sureties. The mortgage, he says, is in terms one to Joseph Bork, and on its face purports to secure the payment to him of \$10,000; and it cannot be enforced as security for the payment of Mr. Hard's debt to Lyon, Bork & Co., or any other firm, even though Joseph Bork were a member thereof, and it can only be enforced as a security for a debt owing to Joseph Bork personally. He urges that the contract is one to answer for the debt of a third person, and must be in writing, and the writing must govern, even though it do not express the parol contract which in fact had been entered into. Thus, if Mrs. Hard had agreed by parol to secure by her mortgage the debts of her husband to Bork, or to any firm of which he was a member, and the mortgage was in terms to secure her husband's personal indebtedness to Bork alone, it could not, he argues, be enforced for the firm indebtedness, because of the want of an agreement in writing to that effect. The principle claimed by the counsel is correct, but it is not applicable to this case. It is true that the indebtedness for which the land of Mrs. Hard is to be held liable is that of a third person, viz., her husband; but her contract in regard to it is in writing, and signed by her. The statute which forbids holding her liable for the debt of another unless by virtue of her own contract in writing, and signed by her, is thus complied with. Evidence of the real and actual consideration of the mortgage may always be given by parol. Either party is always at liberty to show, for any purpose except to prevent its operation

as a valid deed or mortgage, that the consideration was different from that named in the instrument. *Murray v. Smith*, 1 Duer, 412, and cases cited. This principle is not affected because one of the parties to the instrument is a surety for some third person. Thus, in this case, it seems to me plain that parol evidence is admissible to show that the consideration for the execution of this written security for the payment of \$10,000 was the indebtedness then existing or subsequently to be incurred of Mr. Hard, the husband of the mortgagor, to Mr. Bork, or to any firm of which he was a member. The mortgagor must be privy to such consideration. The evidence of the real consideration does not change the liability of the party signing the mortgage. It shows the reasons for assuming the obligation, and the character thereof. While the instrument might show a pecuniary consideration for its execution, parol evidence is admissible to show that the consideration was other than pecuniary; and this has been held not to violate the general rule that parol evidence is not admissible to contradict a writing. Case above cited. The same principle applies to the case of a surety. The consideration, while open to explanation, cannot be enlarged so as to enlarge the liability beyond that which the party has entered into in writing. The amount of the indebtedness of her husband for which Mrs. Hard's property described in the mortgage could be held liable cannot, in any event, exceed \$10,000 and interest properly cast. She has only offered her land as security to that extent, and she cannot be held beyond it by virtue of any parol agreement. She agreed to hold her land liable to secure the payment of \$10,000 in sums and at the times mentioned in the mortgage, and her land is not liable to secure the payment of any greater sum or at any other times than as she promised. Any indebtedness, therefore, which her land could secure, must have been incurred and have become due not later than the times indicated for the payment of the moneys set out in the mortgage. Within the principle permitting parol evidence as to the consideration for which a written instrument was executed, it is entirely competent to show that the consideration upon which the defendant Mrs. Hard executed the mortgage to secure the payment of \$10,000 was the indebtedness of her husband then existing or thereafter to be incurred in favor of Mr. Bork, or in favor of any firm of which he was a member. The agreement by which Mrs. Hard answers for the debt of a third person is the written mortgage signed by her. The consideration for the written agreement may be proved by oral evidence. This consideration will be a matter for proof upon the new trial which must be had, and we will not anticipate further the questions which may possibly be raised on such new trial.

One other question will necessarily be

passed upon on the new trial, and that is the question of the rate of interest. It arises now, and we think we should decide it. The referee gave judgment for the principal sum as set out in the mortgage, with interest at 7 per cent. up to the entry of the judgment. The mortgage contained a provision for the payment of \$10,000, as stated in the commencement of this opinion. This is not like the agreement to pay interest on a principal sum at 7 per cent. until the principal sum is paid, such as the case of *Taylor v. Wing*, 84 N. Y. 471, 477. In the present case the amount of principal was stated, and it was agreed to be paid in installments of \$2,500 in four annual payments, and the sums remaining from time to time unpaid were to bear interest at 7 per cent. This clearly meant that the interest on the principal sum, which, by the terms of the mortgage, was not due, was to be at 7 per cent. Thus the whole

principal sum of \$10,000 was to be at an interest of 7 per cent. from the time of the execution of the mortgage until an installment became due, and then, when the installment was paid, the interest on the balance remaining unpaid, but not yet due, was also to be at the same rate. If an installment was not paid when due, the contract was violated, and interest after that upon such installment could only be recovered as damages, and at the rate of interest authorized by law. *Bennett v. Bates*, 94 N. Y. 354; *O'Brien v. Young*, 95 N. Y. 428. This leaves the mortgage running at 7 per cent. interest upon all sums unpaid up to the time when the legal rate was reduced to 6 per cent., and from that time on at the reduced rate. For the reasons above given the judgment must be reversed, and there must be a new trial, with costs to abide the event. All concur.

JOHNSON v. RUSSELL.

(11 N. E. 670, 144 Mass. 409.)

Supreme Judicial Court of Massachusetts.
Suffolk. May 7, 1887.

Contract, upon an order drawn upon defendant by one John Campbell in favor of the plaintiff, which was as follows:

"\$600. Boston, March 13, 1882.

"Mr. D. W. Russell—Dear Sir: Please pay to the order of Thomas J. Johnson six hundred dollars, and charge the same to my last payment.
John Campbell.

"Dear Sir: This order is for amount due on work done and furnished for your house.

"E. A. P. Newcomb."

When said order was drawn, said Campbell was building a house for defendant, and Campbell was indebted to plaintiff for material used in the construction of said house. Subsequently to the drawing of this order, said Campbell brought suit against said Russell, claiming a balance due him on account of said building. In his answer filed in that suit, with other defenses the answer set up the order above set forth, with others drawn by said Campbell, alleging that he had "promised to pay them out of any funds of the plaintiff in his hands," and claimed that "the amount of said orders should be deducted from plaintiff's claim." Russell testified that he had never seen the answer, and did not know its contents.

At the trial in the superior court, without a jury, before Mason, J., the plaintiff offered in evidence the answer of said Russell, above mentioned, for the purpose of showing a conditional acceptance of said order. The court excluded this evidence, and plaintiff excepted. Plaintiff also offered to show an agreement made in open court, at the trial of the said suit of Campbell v. Russell, by the respective attorneys, that the amount of the Johnson order, with others, should be deducted from any verdict recovered in favor of said Campbell, and judgment entered for the remainder; but it did not appear that Russell knew anything about said agreement, this action not having been brought at that time. The court also excluded this evidence. The plaintiff then offered in evidence the judgment in said suit of Campbell v. Russell, for the purpose of showing that the verdict therein against said Russell was sufficient in amount to cover this and the other orders before mentioned; that execution issue for an amount more than enough to cover the Johnson order, and was returned satisfied in full. No other evidence was offered by either party as to whether or not anything was due from defendant to Campbell. This was also excluded by the court, and defendant excepted. The court found for defendant, and found specially "that there was nothing due from the defendant

to Campbell," and plaintiff alleged exceptions.

John Herbert and George B. Upham, for plaintiff. C. T. Gallagher and J. F. Wheeler, for defendant.

W. ALLEN, J. Having proved the order, it lay upon the plaintiff to prove the acceptance of it by the defendant, and that there was something due from him to Campbell. For the purpose of proving the acceptance, he offered in evidence the answer of the defendant in a former suit brought against him by Campbell to recover the payment, in which the order was set up, and which alleged that the defendant had promised to pay it out of any funds in his hands, and claimed that the amount of it should be deducted from Campbell's claim. This was rejected by the court, solely for the reason, as was assumed at the argument, that it was a statement made in the course of pleading. The rule that the pleadings in a cause are not evidence on the trial, but allegations only, is limited to the suit in which they are pleaded. Outside of that, admissions and declarations of a party in his pleadings are competent against him; but they must appear to be the act of the party, and not merely of his attorney. When it is his personal act, as in an answer in chancery sworn to by him, it is competent. When it is a pleading, by attorney, of formal allegations, which may be presumed to have been made without special instructions from his client, it is not competent. But particular and specific allegations of matters of action or defense, which cannot be presumed to have been made under the general authority of the attorney, but obviously from specific instructions of the party, are competent. *Dennie v. Williams*, 135 Mass. 28, and cases there cited. The answer offered in evidence carries with it the presumption that it was made under the instructions of the defendant; and the testimony of the defendant, that he had never seen the answer, and did not know its contents, without denying that he had given instructions for it, does not overcome the presumption; especially in view of the fact that the cause proceeded to trial and verdict under the answer. We think that the evidence should have been admitted.

It is contended for the defendant that the evidence was immaterial, because the finding of the court that there was nothing due from the defendant to Campbell made acceptance of the order immaterial. After the rejection of the evidence, in the course of the trial, the plaintiff offered other evidence which was incompetent, and was properly excluded, for the purpose of proving that there was enough due from the defendant to Campbell to meet the order. There was no other evidence offered by either party upon the question whether anything was due from the defendant to Campbell, and there was no

evidence before the court that anything was due. Hence the special finding. Upon this question the evidence of the answer of the defendant in the former suit was competent, and, if it had been considered by the court, might have led to a different finding; and it would have been before the court but for the erroneous ruling excluding it. If it should be argued that the finding rendered the evidence immaterial for the purpose for which it was offered, the answer is that it was material for that purpose, and competent as evidence in the case until the finding was made; and the defendant had the right to have it before the court until then, and to have it considered by the court on the question of the finding. The fact that the evidence was not offered for that particular purpose is not material. It was offered for a purpose for which it was competent, and was excluded for reasons that applied equally to an offer for the other purpose. It was offered to prove an acceptance of the order when the plaintiff was proving that part of his case, and the ruling excluding it was, in effect, a ruling that it was not competent for either purpose.

WILGUS, EV.—17

When the plaintiff reached the other part of his case, and attempted to prove that there was something due from the defendant to Campbell, a renewed offer of the rejected evidence for the purpose of proving that fact would have only been asking for a reversal of the former ruling, and, at least, was unnecessary.

The offer to prove an agreement between the attorney in the former suit seems to have been properly excluded. It is not sufficiently definite and certain to show any admission by the defendant's attorney. It appears to have been an agreement by the plaintiff's attorney to deduct from any verdict in his favor the amount of the orders, and to take judgment only for the balance. It does not appear that the defendant's attorney did anything more than to receive the voluntary promise of the plaintiff's attorney. It is not sufficient to prove any admission by defendant's attorney, much less any by which the defendant himself should be affected.

The judgment offered was *res inter alios*, and was properly excluded. Exceptions sustained.

ULRICH v. ULRICH.

(32 N. E. 606, 136 N. Y. 120.)

Court of Appeals of New York. Nov. 29, 1892.

Appeal from superior court of New York City, general term. See 17 N. Y. Supp. 721.

Action by Charles Ulrich against Edward Ulrich, as executor of Barbara Ulrich, deceased. Reversed.

Nelson Smith, for appellant. Edward P. Orrell (Edward W. S. Johnston, of counsel), for respondent.

GRAY, J. The plaintiff brought this action against the executor of his mother's will to recover from her estate the value of services, which he alleged had been rendered by himself and his wife to his mother at her request. A jury rendered a verdict for the defendant, and the only question which demands our consideration, upon the plaintiff's appeal from a judgment affirming the defendant's recovery, arises upon the exception of the plaintiff to a part of the trial judge's charge. After stating what the action was for, the trial judge said: "As a general rule, children are bound to care for their parents in their old age, and filial affection should prompt children to do so. The consequence is that the presumption of law is against such a claim as has been advanced in this action." The plaintiff excepted to this portion of the charge, and insists that it was an erroneous instruction to the jury. The trial judge, it is true, continued by charging that "if the plaintiff has overcome the presumption by proof, and has clearly shown that the services sought to be recovered for were rendered by himself and his wife pursuant to his mother's express promise, * * * the plaintiff is entitled to recover." Under the facts of the case, as they had appeared in the evidence, the charge relating to the obligations of children, and as to the legal presumption, was such as possibly to convey to the minds of the jurors an erroneous understanding of the law. It may well be that the trial judge had before his own mind the moral aspect of the case, and did not intend that his observations should have any other weight with the jury than as moral reflections; but the nature of the case, the sequence of the remarks, and the stage of the case, or the circumstances under which uttered, were such as, in my judgment, to require us to grant a new trial. There is no presumption of law against the maintenance of such a claim. If the plaintiff had established to the satisfaction of the jury the existence of an agreement between his parent and himself, under which he and his wife were to attend upon and to care for her, and she was to pay for such services, he was entitled to their verdict, as much as he would be upon any other valid claim.

A "presumption" has been defined to be a

rule of law that courts and judges shall draw a particular inference from particular facts, or from particular evidence, unless and until the truth of the inference is disproved. Steph. Dig. Ev. c. 1, art. 1. No presumption existed here as a presumption of law. The right to draw any presumption as to the fact of an agreement having been made from the other fact of the relationship between the parties was within the exclusive province of the jury. Justice v. Lang, 52 N. Y. 323. There is no rule of law which compels an inference, from the fact of such a relationship, against the existence of an agreement by the parent to compensate the child for services to be rendered. The law does presume, where there is no proof of a contract, under which the services were performed, that there was no promise or agreement to pay for them; that is, that they were gratuitous. That is the general rule. So far as the relation of parent and child is concerned, it is quite as competent for the parent to contract with his adult child for support and care, and a claim for the compensation due thereunder is quite as valid, as it would be in any other case between individuals. The liability of a child to support its parents, who are infirm, destitute, or aged, was created in England and here by statute. The statute in that respect created duties unknown to the common law. Reeve, Dom. Rel. 284; 1 Bl. Comm. 448; Edwards v. Davis, 16 Johns. 281. Had the trial judge confined his observations to the suggestion that filial affection should prompt children to take care of their parents in their old age, I should find no reason for criticising the correctness of his charge. But the state of the case was such as that, with the moral sense alert, and naturally quick to respond to impressions adverse to the plaintiff's claim, the jury would readily attach great weight to all expressions of the judge presiding at the trial which cast a doubt upon the validity of the claim. In every case, to determine whether the error pointed out has been such as to prejudice the party, the court may consider the nature of the case, and how delicately the scales were balanced between the parties. Here the plaintiff had shown by the evidence of his wife that, after the death of her husband, the testatrix, who was very aged and feeble, told plaintiff and his wife to stay on with her, and that she would pay them for the work they did; that she gave as a reason her helpless condition; that they remained with her until her death, and during that time performed many more or less important services in nursing and caring for her; and that she repeatedly said she would pay them, without mentioning any amount. Her evidence was more or less corroborated by that of witnesses who variously testified to hearing the old woman state that she made the plaintiff and his wife stay with and take care of her, and that she would pay them, or that she would "make it all right

with them." In opposition, the defense gave evidence to show that plaintiff and wife received their board and lodging; that the deceased was an active woman, and not dependent upon others for services, or in need of care; that plaintiff was a shiftless fellow, and would occasionally drink to excess; and that, under the will of deceased, plaintiff received an equal interest in her estate with the other children. When the evidence was all in, and the case ready to be sent to the jury for their verdict, while the plaintiff's evidence of an agreement that they should remain and care for the deceased, and that their services were to be paid for, was uncontradicted by direct evidence, it was seriously attacked by evidence of facts which, if it did not make the agreement appear an improbable one, yet was of such a nature as might justify the jury in discrediting the evidence for the plaintiff.

On the one side was positive evidence which, if believed, entitled plaintiff to a verdict. According to the evidence given for the plaintiff, there were no rambling expressions of a sense of obligation, or of promises to make compensation by testamentary provisions. There was a request to remain, and an agreement to pay for the work to be done. On the other side, there was circumstantial evidence negating, or tending to negative, the making of the alleged agreement, which the jury were at liberty to accept, and upon which they could base a verdict for the defendant. In that condition of things, the just balance of their minds might be disturbed, and their judgment easily led, by any suggestion from the trial judge which seemed to militate against the legality of plaintiff's claim, and which would seem to accord with an aversion of the moral sense. It appears from the record that at the conclusion of the evidence but little time was left, and that the trial judge hastened, as he said, to "finish the case this evening," and he made a very brief charge, in which

he left it to the jury to say whether the plaintiff had "made out a case which meets every requirement of the law as he had laid it down." He had in mind, I do not doubt at all, that he had previously merely commented upon the obligation from child to parent, as such exists in nature, and not as having led them to believe that any rule of law stood in the way of such a claim in such cases. But I am constrained to the belief that prejudice may have been worked to the plaintiff's case by the observations of the trial judge. He had observed that it was "a general rule that children are bound to take care of their parents in their old age," and that "the consequence" of that rule, and of the promptings of filial affection, was "that the presumption of law was against such a claim as had been advanced in this action." Both statements were incorrect as legal propositions; for, of course, there is no such general rule of law, nor such a presumption. Coming from the lips of the judge, from whom they were to take the law applicable to the case, can we, and should we, say that they had no influence upon the minds of the jury, or that, if they did have, the error was cured by the subsequent instruction to the effect that, "if the plaintiff had overcome the presumption by proof," he might recover? I think not. This was essentially a case for decision by a jury upon the evidence before them, as they believed the facts and weighed the probabilities. They might well have understood that there was a rule of law, which amounted to a presumption, against the validity of such a contract and claim, and the plaintiff should therefore have a new trial, in which a verdict may be reached without the possible influence of an erroneous idea leading to its formation. The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur, except ANDREWS, FINCH, and O'BRIEN, JJ., dissenting.

HILTON v. BENDER.

(69 N. Y. 75.)

Court of Appeals of New York. March 20, 1877.

Marcus T. Hun, for appellant. Amasa J. Parker, for respondent.

CHURCH, C. J. This is an action of ejectment to recover an undivided interest in premises in the city of Albany, situated on the corner of South Pearl street and Hudson avenue. The plaintiff claims as devisee under the will of James Hilton, Sr., who died, as I infer, in December, 1836, by which he devised and bequeathed his residuary estate, real and personal, to Robert Hilton, Jr., a nephew, and Catherine, his wife, and Richard Hilton, the plaintiff, who was also a nephew of the testator. The defendant is a daughter of Robert Hilton, Jr., and Catherine, his wife, and by descent and a conveyance from her brother is, in any event, entitled to their interest under the will, which interest is either an undivided one-half or two-thirds, depending upon the construction of the residuary clause, which will be hereafter noticed. The defendant however claims title to the whole premises under a lease for one thousand years, to one John Hilton, by the corporate authorities of the city of Albany, dated in March, 1836, upon a sale for an assessment, and by him, through another person, to her; and also under a like conveyance from the city authorities, 1861, to one Paddock, and by him to her. The plaintiff was nonsuited at the trial, but the record does not state upon what ground the nonsuit was granted. The general term affirmed the judgment upon the ground of a title in the defendant to the whole premises by adverse possession under the assessment deed of 1836. This ground is now abandoned by reason of the recent decision of this court in *Bedell v. Shaw*, 59 N. Y. 46, holding that possession, to be adverse so as to ripen into a title when long enough continued, must be accompanied by a claim of title in fee, and hence, that a claim under such a lease is not sufficient, and is not in hostility to the title of the owner. But it is insisted that the defendant has affirmatively and conclusively, in law, established a title to the whole premises by virtue of the two assessment deeds, and especially by the first one, dated in 1836.

The deed or lease only from the mayor is produced. No other paper or proceeding was proved on the trial. The authority for making improvements and for levying and collecting assessments therefor in the city was derived from sections 4 and 5, chapter 164 of the Laws of 1828, which, in substance, were re-enactments of sections 30 and 31 of chapter 185 of the Laws of 1826. By those sections it was made lawful for the mayor, aldermen and commonalty of the city "to order and direct" certain improve-

ments, including the opening of streets and the making and repairing of sewers, drains, etc., and upon the completion of any such work so ordered, to cause an account of the expense to be made by the city superintendent or other person or persons, to be appointed by them, and to apportion the same under oath among the houses and lots intended to be benefited in proportion to the advantage which each was deemed to acquire, specifying the owner or occupant, which apportionment was to be returned to the mayor, etc., and when returned, they were to cause public notice to be given of such apportionment for thirty days, and if no cause was shown against confirmation, upon its approval it was to be filed in the office of the clerk of the common council, and then it was to be binding and a lien upon the lands assessed. The mayor, etc., were then authorized to sue for and recover such assessment, or in case of refusal to pay, cause a notice of such apportionment and of the amount forming a part thereof to be published for three months, requiring the owners of the respective lots to pay the assessment, and in default, that such lot or lots would be sold at public auction, and they were authorized to sell accordingly.

I have thus briefly abstracted the requirements of the law to show that the legislature required official action and record evidence of the principal steps preliminary to a sale, so that the property rights of the citizen should not be sacrificed, except upon compliance with these public and formal acts.

It is well settled that every statute authority in derogation of the common law to divest the title of one and transfer it to another, must be strictly pursued. It is not a case for presuming that public officers have done their duty, but their acts must be shown and the onus lies on the purchaser. The recitals in the deed are not evidence against the owner, but they must be proved true. *Sharpe v. Speir*, 4 Hill, 86. The statute does not declare that the deed shall be deemed *prima facie* evidence of the regularity of the proceedings or the sale, and hence these proceedings must be proved. The clause that the purchaser shall "hold the land against the owner and all persons claiming it," does not obviate the necessity of such proof. The clause is based upon the presumption that the statutory requirements have been complied with and are merely declaratory in that event of the nature of the interest which the purchaser is entitled to enjoy.

In tax sales there is a fundamental condition to their validity that there should have been a substantial compliance with the law in all the proceedings of which the sale was the culmination. "This would be the general rule in all cases in which a man is to be divested of his freehold by adversary

proceedings, but special reasons make it peculiarly applicable to the case of tax sales." Cooley, Tax'n, 324. The proceedings are ex parte. The owner is to be deprived of his land. The price usually paid is trifling, and hence it is peculiarly appropriate that strictness in observing the requirements of the law should be exacted. *Brown v. Veazie*, 25 Me. 359. These general rules are now universally applied and do not require elaboration, and if applied in this case they would be plainly fatal to the defense founded upon the assessment deed of 1836.

It is insisted however by the learned counsel for the defendant, that from the lapse of time which has intervened since the deed was given (more than thirty years) and the alleged possession under it, a conclusive presumption may be indulged that all the proceedings were regular and in accordance with the statute. This position cannot be sustained. The general rule laid down by Mr. Greenleaf in his work on Evidence that "when an authority is given by law to executors, administrators, guardians, or other officers, to make sales of land upon being duly licensed by the courts, and they are required to advertise the sales in a particular manner and to observe other formalities in their proceedings, the lapse of sufficient time (which in most cases is fixed at thirty years) raises a conclusive presumption that all the legal formalities of the sale were observed," may be conceded, but this rule does not justify the position insisted upon in this case. *Greenl. Ev.* § 20. The rule does not apply to records and public documents which are supposed to remain in the custody of the officers charged with their preservation, and which must be proved, or their loss accounted for and supplied by secondary evidence.

The foundation of the proceeding in question was the action of the common council in ordering and directing the improvement, and equally indispensable was the confirmation, approval and filing of the apportionment which made the assessment "binding" upon the owners. Without these official acts the subsequent proceedings including the deed were a nullity. The acts of the mayor, aldermen and commonalty of the city of Albany were matters of record. They had a clerk, and the act specifically directs the apportionment to be filed in his office. The presumption is that these records and documents are in existence, and in the absence of evidence, if they cannot be found or their loss or destruction in some way accounted for or explained, the natural presumption is that they never did exist.

When the law exacts acts of record, and provides for perpetuating documentary evidence, it is unreasonable, because against the usual course of things, to presume without proof that they once existed and have

been lost. A presumption is an inference of a fact not known arising from its necessary or usual connection with others which are known. To infer a record once existing and lost, because not found, where the law requires it should be kept, would reverse the rule and create a presumption of one fact from another not usually connected with it. Facts may be shown doubtless from which the existence of the records and their subsequent loss or destruction might be inferred. No such facts were shown in this case. The casual examination made during the trial can scarcely be called a search. There was no evidence, and certainly not sufficient, that the records are not in existence, and if not, there were no facts proved to rebut the presumption arising in that event that they never did exist. When a person seeks, by a purchase of valuable property for a trifling sum at a tax sale, to cut off the title of the owner, it behooves him to see to it that the proceedings have all been in substantial accordance with the requirements of law, and that the proper evidence of the same has been preserved, and there is manifest propriety in applying this rule to a purchase by one sustaining the relations to the owner which the evidence tends to show that John Hilton did.

Courts will not aid in supplying fundamental defects in such a case by presumptions. Again it appears, by a recital of the deed, that the three months' notice of sale was published in the *Albany Argus*, a paper then and now published in the city of Albany, and no reason was adduced or fact shown why the notice, as published, might not be produced.

Presumptions of regularity may be indulged as to notices and other intermediate steps not matters of record; but even then they are not always conclusive, but often depend upon the circumstances proved. When a purchaser at a tax sale has taken possession under his deed, and continued undisturbed for a long period in the peaceable enjoyment of the property, claiming by virtue thereof, and the owner is in a position to contest the title, and especially if he is chargeable with knowledge of the claim, the presumption is very strong, and as to some facts after thirty years may be conclusive in favor of regularity. But if the purchaser should lie by, before taking possession, until his deed was very old, he would come with a poor grace into court to ask for a presumption to supply facts which he did not venture to put himself in a position to establish when it was practicable, if they existed, to prove them. *Cooley, Tax'n*, 330. Between these extreme cases will be found many others partaking more or less of the elements of each. It is impracticable to lay down a rule applicable to all cases. Indeed there is no fixed rule on the subject. It is clear that the age of the deed, while it

may be important, is not decisive. In this case, as we have seen, it could not be found, as a question of fact, that the preliminary steps had been taken, or that the record evidence had ever existed, of the facts which were matters of record, and no evidence was given as to other facts from which an inference could be drawn. There was other evidence bearing in a greater or less degree upon the character of the possession of John Hilton and the defendant, which it was proper to be considered. In the first place the plaintiff was in no position to contest the title until the death of Rachel Hilton, the surviving beneficiary under the will. His interest was a remainder after two lives. It does not distinctly appear when Rachel Hilton died, but I infer from the evidence that it was in the neighborhood of 1860, or later, and the action was commenced in 1871. The plaintiff was then, and is now, a non-resident of the state, and there is no evidence whether he had any knowledge of the claims now presented or not. There was evidence also tending to show that at the time John Hilton bid off the premises at the tax sale and received the lease, he was in possession as a tenant of the owner, and also as an agent to some extent. This occurred while the owner was living, in the spring previous to his death. The character of his possession afterward was somewhat equivocal from the evidence. There was evidence that he brought forward his assessment deed when the will was read, but when that was does not appear. The testator died in December, 1836, but the will was not proved until 1839. It is quite probable that he intended to claim the property by virtue of the tax title, as it was talked of in the family, and it was in evidence that the defendant complained of his treatment of the heirs in this respect, and yet there was evidence tending to show that he afterward supplied the life beneficiaries with groceries in payment for their interest in the use of the premises. The executors are both dead, and it does not appear that they ever had possession. In 1852, John Hilton made an assignment for the benefit of creditors, conveying, under general words, without description, all his property, real and personal, and in 1858 his assignees conveyed the premises to a third person for the nominal consideration of \$25, who, for a like consideration, conveyed them to the defendant. It does not appear that the assignees ever had or claimed possession of this property during the six years intervening between the assignment and their deed. There is evidence tending to show that the defendant has received the rents since 1857, which implies that she has been in possession from that time. The deed from the assignees was not executed until 1858, and, if she was in in 1857, it must have been by virtue of her title under the will as co-tenant with the plaintiff, or, if Rachel Hilton

was then living, possibly under some arrangement with her. The inferences to be drawn from these facts, bearing upon legal propositions, involved as to the effect of the purchases by John Hilton and by the defendant and as to whether the premises were held under the tax title, and have been so held continuously since that period, are to be drawn by the jury. And these facts have some bearing upon the strength of presumptions which may be invoked to supply facts not capable from lapse of time of positive proof. *Worthing v. Webster*, 45 Me. 270; 71 Am. Dec. 543; *Cooley, Tax'n*, 331, 332, and cases cited.

It is not intended to intimate that the tax sale may not be upheld, but only that there was an entire failure of proof upon the trial, and that it is not a case for the application of a conclusive presumption of regularity. The assessment deed of 1861 to William S. Paddock is void. The commissioners to assess the damages and recompense for widening Hamilton street, although appointed according to the statute then in existence (chapter 86 of the Laws of 1844), were not appointed in accordance with section 7 of article 1 of the constitution. In this respect the statute is unconstitutional, as this court decided in *Menges v. City of Albany*, 56 N. Y. 374. This defect appeared affirmatively upon the trial, and as it was a substantial link in the chain of legal requirements necessary to bind the lands of the owners supposed to be benefited, the defect is fatal to the validity of the entire proceedings. The question in respect to the title of James Hilton, Sr., was not insisted upon in this court. The evidence would at least justify a finding of facts by the jury sufficient to establish a good title. A nonsuit on that ground would have been erroneous.

As there must be a new trial, it is proper to determine the extent of the interest of the plaintiff in the premises under the will of James Hilton, Sr. The will, after devising and bequeathing the property of the testator, to the executors in trust to apply the income, rents and profits to the support of the son of the testator, James Hilton, and his wife, Rachel, and the survivor for life, contained this clause: "I give, devise and bequeath the residue and remainder of my real and personal estate, * * * to Robert Hilton, Jr., son of my deceased brother Robert, and Catherine, his wife, and Richard, son of my brother Derrick, as tenants in common, and their heirs forever." There is nothing in the language indicative of an intent to give Robert Hilton, Jr., and his wife a half interest and the plaintiff the other half. The devise to Catherine, the wife, is as specific as to either of the others, and the language applies to her the same as the others, and I can see no reason for any distinction. The devise is to Robert, Catherine and Richard, as tenants in common, and to their heirs and assigns forever. It follows

that the plaintiff's interest under the will is only an undivided third, instead of one-half as claimed. It is unnecessary to notice the other points.

The judgment must be reversed and a new trial granted, with costs to abide the event. Judgment reversed.

All concur; RAPALLO, J., absent.

UNITED STATES v. ROSS.

(92 U. S. 281.)

Supreme Court of the United States. Oct., 1875.

Appeal from the court of claims.

Edwin B. Smith, Asst. Atty. Gen., for the United States. George Taylor, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is incumbent upon a claimant under the captured or abandoned property act to establish by sufficient proof that the property captured or abandoned came into the hands of a treasury agent; that it was sold; that the proceeds of the sale were paid into the treasury of the United States; and that he was the owner of the property, and entitled to the proceeds thereof. All this is essential to show that the United States is a trustee for him, holding his money. That there is in the treasury a fund arisen out of the sales of property captured or abandoned, a fund held in trust for somebody, and that the claimant's property, after capture or abandonment, came into the hands of a quartermaster of the army or a treasury agent, is not sufficient. There must be evidence connecting the receipt of it by the treasury agent with the payment of the proceeds of sale of that identical property into the treasury. We do not say that the evidence must be direct. It must, however, be such as the law recognizes to be a legitimate medium of proof; and the burden of proof rests upon the claimant who asserts the connection.

In the present case, the court of claims has not found as a fact that the claimant's cotton came into the hands of a treasury agent, that it was sold, and that the proceeds of that cotton were paid into the treasury. No connection between the cotton captured and the fund now held by the United States has been established. Certain facts have been found, and from them it was inferred, as matter of law, that other facts existed; and upon the facts thus inferred the court gave judgment.

We think that in this there was error. The claimant owned, in May, 1864, thirty-one bales of cotton, then in a warehouse in Rome, Ga. On the 18th of that month, Rome was captured by the United States forces; and shortly afterwards the cotton was removed on government wagons to a warehouse adjoining the railroad leading from Rome to Kingston, and connecting there with a road leading thence to Chattanooga. Whether it was the only cotton in that warehouse is not found; but it is inferrible from the other facts found that it was not. Subsequently (but how long afterwards does not appear) all of the cotton in that warehouse was shipped on the railroad to Kingston, the road being then in the possession of the military authorities. It is next shown that cotton (some cotton) arrived in Kingston from Rome

before Aug. 19, 1864, and was forwarded to Chattanooga; that, on the 19th of August, forty-two bales were received at Chattanooga from the quartermaster at Kingston; that thence they were shipped to Nashville, where they were received as coming from Kingston, turned over to the treasury agent, and sold. The proceeds of sale were paid into the treasury, and no title to these forty-two bales has been asserted by third persons.

Such were the facts found; and from them the court deduced, not as a conclusion of fact, but as a presumption of law, that the thirty-one bales removed on government wagons to the warehouse immediately adjoining the railroad at Rome, shortly after May 18, 1864, were a part of the forty-two bales received at Nashville on the 24th of August, four months afterwards, and there turned over to the treasury agent. It is obvious that this presumption could have been made only by piling inference upon inference, and presumption upon presumption. Because the thirty-one bales of the claimant were taken to the warehouse alongside of the railroad at Rome in May, 1864, and the cotton in that warehouse afterwards, at some unknown time (whether before or after Aug. 19 does not appear), was shipped on the road to Kingston, it is inferred that the claimant's cotton was part of the shipment. Because somebody's cotton (how much or how little is not shown) arrived at Kingston from Rome at some time not known, and was forwarded to Chattanooga before the 19th of August, 1864, it is inferred that the claimant's thirty-one bales, presumed to have reached Chattanooga, thus arrived, and were forwarded; and, because forty-two bales were received at Chattanooga on that day from the quartermaster at Kingston, it is inferred that the claimant's bales were among them. These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie, Ev. p. 80, lays down the rule thus: "In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue." It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not

permit a decision to be made on remote inferences. Best, Ev. 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglas v. Mitchell*, 35 Pa. St. 440.

The court of claims thought the facts found by them entitled the claimant to the legal presumption said by this court to exist in *Crussell's Case*, 14 Wall. 1; and therefore determined, as a conclusion of law, that the cotton taken from the claimant was a part of that transmitted to Nashville, and turned over to the treasury agent and sold. We think *Crussell's Case* does not justify such a conclusion. Because property was captured by a military officer and sent forward by him, and because there is an unclaimed fund in the treasury derived from sales of property of the same kind as that captured, because *omnia presumuntur rite esse acta*, and officers are presumed to have done their duty, it is not the law that a court can conclude that the property was delivered by the military officer to a treasury agent, that it was sold by him, and that the proceeds were covered into the treasury. The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his treatise on Evidence (section 300), says: "The true principle intended to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of facts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by

which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy." Nowhere is the presumption held to be a substitute for proof of an independent and material fact. The language of the opinion in *Crussell's Case* would perhaps mislead, were it not read in connection with the finding of facts. The question was, whether seventy-three bales of cotton of the plaintiff's had been forwarded, with a much larger amount, to the officer in charge of military transportation at Nashville, and by him turned over to the treasury agent. There was no direct proof that the plaintiff's cotton was included in the shipment; but there was proof that the treasury agent forwarded the cotton received by him to the supervising agent at Cincinnati, where a sale was soon after made, and some of the bales sold were marked with the plaintiff's mark. The question, therefore, whether the military officer who shipped the large quantity had shipped with it the cotton of the plaintiff, was not left to depend upon the presumption that he had done his duty. There was distinct and independent proof of it in the fact that some of the plaintiff's cotton had reached Cincinnati, and had been sold there. The presumption was only confirmatory of what had been proved by evidence, and in confirmation of that proof it might be invoked. This is all that can fairly be deduced from the opinion of the court as delivered by the chief justice.

No more need be said of the present case. It is not found as a fact that the identical cotton captured from the plaintiff ever came into the hands of a treasury agent, or that it was sold, and that the proceeds were paid into the treasury; and the presumption of law adopted by the court, that the cotton was a part of that transmitted and sold, was unwarranted.

Judgment reversed, and cause remanded for a new trial.



FLETCHER et al. v. FULLER.

(7 Sup. Ct. 667, 120 U. S. 534.)

Supreme Court of the United States. March 7, 1887.

In error to the circuit court of the United States for the district of Rhode Island.

Wm. H. Greene and Jas. Tillinghast, for plaintiffs in error. Livingston Scott and Elisha C. Mowry, for defendant in error.

FIELD, J. This is an action of ejectment to recover possession of twenty-seven twenty-eighths undivided parts of a tract of land, containing about 14 acres, situated in the town of Lincoln, formerly Smithville, in the state of Rhode Island. The plaintiff, a citizen of Connecticut, sues the defendants, citizens of Rhode Island, in his own right, and as trustee for others.

The declaration contains several counts, all of which, except two, are withdrawn. In these the plaintiff alleges that on the twenty-fifth of October, 1874, he was "seized and possessed in his demesne, as of fee in his own right and as trustee," of twenty-seven twenty-eighths undivided parts of the tract of land which is described, and that the defendants on that day and year, with force and arms, entered thereon, and ejected him therefrom, and have ever since withheld the possession, to his damage of \$1,000. The two counts differ merely in the description of some of the boundary lines of the tract. The defendants pleaded the general issue and 20 years' possession under the statute of possessions. Upon these pleas issues were joined, and the case was tried; the parties stipulating that the plea of the statute should be held to apply to any period or periods of 20 years that could be covered by any other like plea that might have been filed, and that either party might offer any evidence and rely upon any matters that would be admissible under such plea or pleas, and any proper replications or other proceedings thereon. The case was tried three times, resulting the first time in a verdict for the defendants, and at the other times in a verdict for the plaintiff. The judgment on the last verdict is brought before us for review by the defendants on a writ of error. Numerous exceptions were taken in the progress of the trial to the rulings of the court in the admission and rejection of evidence, and to the instructions given and refused to the jury; but the conclusions we have reached with respect to the instructions given and refused, as to the presumption of a deed to the ancestors in title of the defendants, render it unnecessary to consider the others.

It appears from the evidence at the trial that the land in controversy was the western part of a tract of 33¾ acres, belonging, in 1750, to one James Reed, and which, by early conveyances, became divided into three parcels, one containing 22¼ acres, one

5½ acres, and the third 6 acres, as shown by a diagram submitted, by consent of parties, to the jury, of which the following is a reduced copy. [See opposite page.]

A turnpike, running through the tract northerly and southerly, was opened in 1816. The 22¼-acre parcel was conveyed to Francis Richardson, of Attleboro, Massachusetts, by deed dated April 10, 1750. The land in controversy is a portion of this parcel lying west of the turnpike. The five and a half acre parcel was conveyed to Ezekiel Fuller by deed dated November 17, 1750. The six-acre parcel was conveyed to Abigail Fuller, wife of Ezekiel, and daughter of Francis Richardson, by deed dated January 21, 1756.

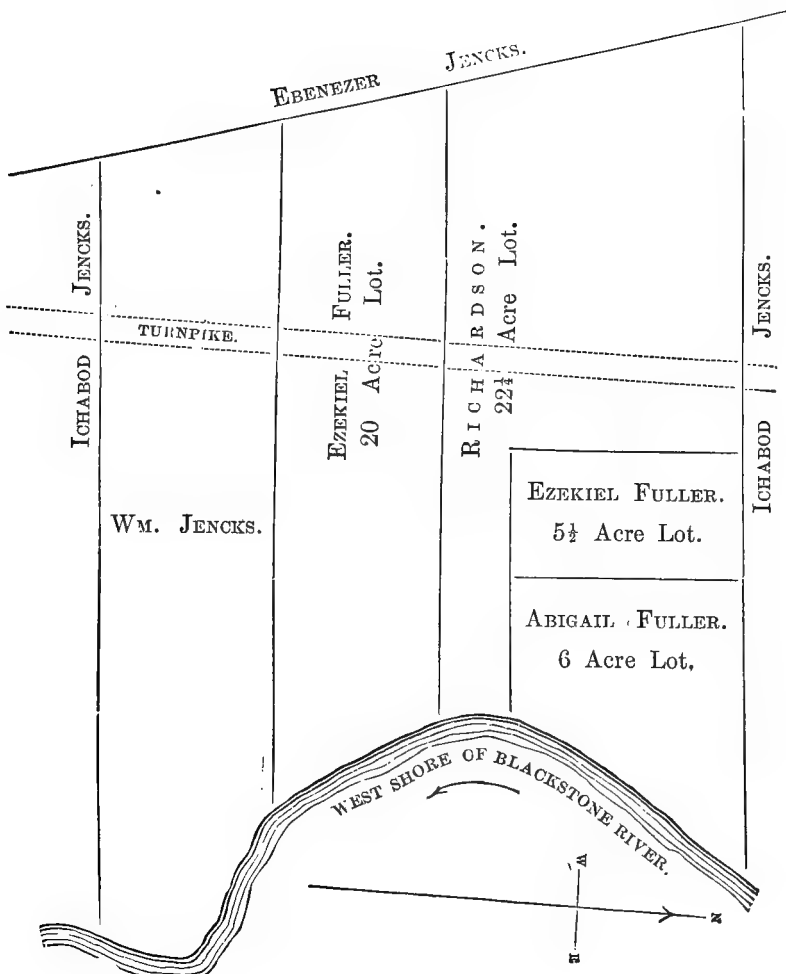
The plaintiff claims to derive title under the will of Francis Richardson, dated May 26, 1749, and the codicil thereof, dated August 10, 1750, which were admitted to probate in Massachusetts, January 19, 1756. A copy of the will and codicil, and of the Massachusetts probate, was produced and given in evidence, together with a certificate of their having been filed and recorded in the probate office in Lincoln on the twenty-seventh of August, 1881.

It does not appear that there was any direct evidence that Francis Richardson was seized of the 22¼-acre parcel at the time of his death. The presumption, in the absence of any opposing circumstances, is undoubtedly that, being the owner at the date of the codicil, August 10, 1750, he continued such owner up to the time of his death, which occurred some years afterwards. Whether sufficient opposing circumstances to rebut this presumption are found in the absence of all claim to the land for three-quarters of a century by the devisee or her husband, or her heirs, and the continued claim of ownership by the ancestors in title of the defendants during that period, is a question to be hereafter considered.

It is stated in the record that there was evidence tending to show that Abigail Fuller, the devisee, and her husband, entered into possession of the property devised under the will and codicil, but what that evidence was does not appear. Abigail died prior to 1766, leaving her husband surviving her. He left Smithfield some time in 1761 "for parts unknown." It appears, also, that in a deed executed by him on the eleventh of April, 1761, of the 20-acre lot designated on the diagram, he recited that such lot was bounded on the north by "his former land." With the exception of the evidence tending to show that the devisee and her husband entered into possession of the property devised, and the reference by the husband in his deed to the tract as his former land, there was nothing to show that any claim of right or title to the land had been made by them, or by their heirs, for nearly three-quarters of a century, either by the exercise of acts of ownership over it, such as its occupation or the use of its products, or by leasing or

selling it, or by the payment of taxes, or in any other way. And, for over 40 years after the lapse of the three-quarters of a century, the only claim of title made by the heirs of the devisee to any portion of the 22¼-acre lot consisted in the fact that in 1835 they brought an action against certain persons, with whom the defendants were not in privity of title or ancestry, for the recovery of another portion of the 22¼-acre parcel, which action was discontinued in 1838 on account of the poverty and pecuniary inability of the heirs to carry it on; and in the fact that, at varying intervals between 1826 and 1857 (not 1858, as stated in one part of the record), they had been in the habit, under such claim, of cutting wood thereon openly for family use, and the manufacture of baskets, in which business some of them were engaged, and carrying it to their homes; and that on three occasions, once in 1840, once in 1845, and once in 1852, some of them in contemplation of taking legal proceedings to establish their title, had gone around and upon the land, and pointed out its boundaries.

When Ezekiel Fuller departed from Smithfield, in 1761, he left two children, Francis and Abigail, without means of support, and, at a meeting of the town council in September following, proceedings were taken to provide for them. In a resolution reciting that "Ezekiel is gone, we know not where;" that his children were then and likely to be chargeable to the town; that little or nothing of Ezekiel's estate was to be found to support them, but that it was assumed there was some estate belonging to him,—a person was appointed to make proper inquiry and search for it, "to know what land there is belonging to the family of said Ezekiel, and secure the same for the support of the children." It would seem that the person thus appointed, reported that there was a piece of land—a six-acre parcel—which was possessed by Ezekiel in right of his wife; for the town council, at a meeting in March, 1776, after reciting that there was nothing of said Fuller's estate left behind to maintain his children but a small piece of land, and that no provision for their support could



be had without the favor and authority of the general assembly to sell and give a deed of it, appointed one Edward Mowry to lay the matter before the assembly, and request that it would pass an act to enable some proper person to dispose of the parcel, and clothe him with authority to give a deed thereof. Mowry presented a proper petition to the assembly, which granted the prayer, and empowered the town treasurer, with the consent and advice of the town council, to sell the land, and apply the money received for the purpose stated; that is, the support of the children. A sale of the six-acre lot for £30 was accordingly made by the town treasurer under the authority thus conferred.

Abigail, the wife of Ezekiel, left five children surviving her, all of whom died before their father except Abigail, Jr., who was one of the two supported by the town. The father, who disappeared from Smithfield in 1761, died in the poor-house in Attleboro, Massachusetts, in 1800. Abigail, the daughter, was born December 29, 1757; became of age, December 29, 1778; and was married to Benjamin Fuller, December 1, 1779. He died in 1832, and she died in 1835 intestate. The plaintiff is the grandson of this Abigail, and the parties for whom he is trustee are her other descendants. They all derive whatever title they have from her.

On the twenty-fourth of May, 1874, a century and eighteen years after the probate of the will of Francis Richardson, all the heirs of Abigail Fuller, except one, executed a power of attorney to Theodore C. Fuller, also one of said heirs, authorizing him to sell to Nathan Fuller, the plaintiff in this action, all their title and interest in the tract conveyed by James Reed to Francis Richardson by deed dated April 10, 1750, and devised to Elizabeth Fuller, wife of Ezekiel, by his last will and testament probated January 19, 1756, to hold the same upon trust to prosecute to final conclusion legal proceedings necessary to recover possession of the premises, to employ counsel for that purpose, to conduct the proceedings, and to make such compromises of the grantors' claims as to him and his counsel might seem best. The same grantors, by their attorney, on the same day, executed a deed of the same tract of land to Nathan Fuller, reciting a consideration of \$10, upon trusts similar to those contained in the power of attorney. Both documents were duly acknowledged by the grantors. The delivery of the deed was made by the attorney in this way: He and the grantee went upon the land with three other persons, and while upon it he delivered the deed to the grantee. He also took up some earth in his hands, and passed it to the grantee. This he had been instructed to do by his counsel as the form of delivering possession. The parties were about 15 minutes on the land. There was no evidence of any notice to or knowledge by the defendants

of these acts, and they testified that they had neither. This is the case of the plaintiff, briefly stated.

The defendants trace their title to the land in question by continuous claim of title from a deed of the 22¼-acre parcel, made by one Jeremiah Richardson, a grandson of the testator, Francis Richardson, to Stephen Jencks, dated April 8, 1768, containing full covenants of title and warranty, and recorded in the records of Smithfield on July 10th following. Jeremiah Richardson was the son of Francis Richardson, who was a son of the testator, and is named in the will as having died. Jeremiah had a brother also called Francis Richardson, who died prior to March, 1766. Stephen Jencks, by deed dated August 12, 1796, containing full covenants of warranty, to secure several notes, amounting to \$3,000, mortgaged the land in controversy, with adjoining lands to which he had acquired title, making in all 50 acres; of which the 20-acre lot designated on the diagram was one parcel, which he had purchased in 1763 for £640, and the 6-acre lot, also designated on the diagram, was another parcel, which he had purchased in 1768 for £45. He died in 1800, leaving a will, by which he devised his real estate in Smithfield and elsewhere to his children. Stephen Jencks, Jr., his son, acquired the interests of the other heirs, and by deed dated May 18, 1804, conveyed the whole, including by specific description the land in controversy, to his brother, Jerahmael Jencks, who was the grandfather and ancestor in title of the defendants. Other portions of the 22¼-acre parcel were conveyed by ancestors in title of the defendants, by deeds to different parties, containing full covenants of title and warranty, dated, respectively, April 12, 1841, December 3, 1845, and May 21, 1860, and they entered into possession of the respective parcels, and inclosed and improved them. In May, 1864, the father of the defendants, from whom they derive their title, surveyed and platted into town lots the remaining portion of that parcel, being the land in controversy. In the partition of the estate of the grandfather, Jerahmael Jencks, between his heirs at law, in 1824, this land had been taken by him as part of his estate, and platted as such in the partition plat. He died in 1866.

The land was not inclosed on the line of the turnpike. In 1838 a fence was put up on the westerly side by an adjoining owner. On the southerly side there was at one time a fence running from the turnpike westerly to the other side of the ledge hereafter mentioned, but it disappeared in 1835. On the northerly line there was only a brush-fence until 1867, when a purchaser of adjoining land erected one. The land has never been put under cultivation. Prior to 1858 it was covered with wood, and every year from 1829 to 1857 the ancestors of the defendants cut wood upon it for family use. In 1857 the father of

the defendants cut and applied to his use all the wood of value then remaining. The land had an extensive ledge of rock running across its center from north to south, which was opened by defendants' ancestors as early as 1835. In 1845 or 1846 large quantities of stone were quarried and sold by them to railroad companies; and from that time down to the trial, with longer or shorter intervals, never of more than a year or two, the ledge was worked more or less extensively by the defendants or their ancestors in title, or their lessees and tenants, and the stone removed. There is no evidence that any other person had ever worked the ledge, or taken stone off the land, or attempted to do so. The father of the defendants put up a sign on the land, stating that all persons were forbidden from taking wood or stone from it. In 1860 or 1861 his lessee built a barn and tool-shed on the land near the ledge, for his use in quarrying; these structures being in full view from Broad street, formerly the turnpike. He also dug a well, from which he obtained water for his business. The barn, with lofts for hay, was of sufficient capacity "to accommodate, and did accommodate, six or eight horses, or more." It remained on the land, with some additions, until some time in 1869, when it was removed by the lessee. The land was assessed for taxes to the ancestors in title of the defendants, and paid by them, for 20 years, between 1770 and 1805. The tax-lists for the other years up to 1805 could not be found. From 1805 to the time of the trial, a period of 77 years, the land was assessed to them, and the taxes were paid by them. The statute of Rhode Island respecting the assessment of taxes, in force between 1798 and 1825, required the assessors to assess taxes on real estate to persons who held and occupied it, and the one in force between 1825 and 1855 required them to assess the taxes to those who held and occupied it, or to the owners thereof, and the one in force after 1855, to the owners thereof. No taxes were ever assessed to the Fullers, or paid by them. Neither plaintiff nor defendants, nor their ancestors, ever resided on the premises, and the land was occupied and possessed by the ancestors in title of the defendants only in the way mentioned.

Upon the case thus presented, and we have not omitted, we think, any material circumstance in the statement, the defendants asked an instruction to the jury as to the presumption they might make of a lost grant to their ancestor in title, which the court refused. Its charge was thus: "Of course, gentlemen, if you find that you can presume a grant, if you find from the testimony that there was a lost deed which passed from Abigail Fuller to Jeremiah Richardson, or to Francis Richardson, and the property was inherited by Jeremiah, so that Jeremiah had a good title to convey to Stephen Jencks, that makes the title of the defendants here complete. * * *

But, gentlemen, you are to look into the evi-

dence upon this question of a grant, and, if the evidence in favor of the presumption is overcome by the evidence against such a grant, then, of course, you will not presume one. It is a question of testimony."

The defendants requested the court to instruct the jury "that the presumption they were authorized to make of a lost deed was not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the possessor." This instruction the court refused to give, or to modify its charge in conformity with it. The defendants now contend that the court thus erred, its charge being, in effect, that, in order to presume a lost deed, the jury must be satisfied that such a deed had in fact actually existed. Such seems to us to be the purport of the charge, and therein there was error.

In such cases, "presumptions," as said by Sir William Grant, "do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, as Lord Mansfield says, merely from a principle, and for the purpose of quieting the possession. There is as much occasion for presuming conveyances of legal estates; as otherwise titles must often be imperfect, and in many cases unavailable, when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is already vested." *Hillary v. Waller*, 12 Ves. 239, 252; *Eldridge v. Knott*, Cowp. 215.

The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed of conveyance to which the occupant of land is entitled, or may lead to its loss after being executed. It is a matter of almost daily experience that reconveyances of property, transferred by the owners upon conditions or trusts, are often delayed after the conditions are performed or the trusts discharged, simply because of the pressure of other engagements, and a conviction that they can be readily obtained at any time.

The death of parties may leave in the hands of executors or heirs papers constituting muniments of title, of the value of which the latter may have no knowledge, and there-

fore for the preservation and record of which may take no action; and thus the documents may be deposited in places exposed to decay and destruction. Should they be lost, witnesses of their execution, or of contracts for their execution, may not be readily found, or, if found, time may have so impaired their recollection of the transactions that they can only be imperfectly recalled, and of course imperfectly stated. The law, in tenderness to the infirmities of human nature, steps in, and by reasonable presumptions that acts to protect one's rights which might have been done, and in the ordinary course of things generally would be done, have been done, in the particular case under consideration, affords the necessary protection against possible failure to obtain or preserve the proper muniments of title, and avoids the necessity of relying upon the fallible memory of witnesses, when time may have dimmed their recollection of past transactions, and thus gives peace and quiet to long and uninterrupted possessions.

The rule of presumption, in such cases, as has been well said, is one of policy, as well as of convenience, and necessary for the peace and security of society. "Where one uses an easement whenever he sees fit, without asking leave and without objection," says the supreme court of Pennsylvania, "his adverse and uninterrupted enjoyment for twenty-one years is a title which cannot afterwards be disputed. Such enjoyment, without evidence to explain how it began, is presumed to have been in pursuance of a full and unqualified grant." *Garrett v. Jackson*, 20 Pa. St. 335. The same presumption will arise whether the grant relate to corporeal or incorporeal hereditaments. As said by this court in *Ricard v. Williams*, 7 Wheat. 108, speaking by Mr. Justice Story: "A grant of land may as well be presumed as a grant of a fishery, or of a common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession."

It is not necessary, therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its non-execution. In *Edson v. Munsell*, 10 Allen, 557, which was an action for obstructing the enjoyment of an easement, the doctrine of acquiring such rights by prescription or adverse possession is elaborately considered;

and it is there said that "the fiction of presuming a grant from twenty years' possession or use was invented by the English courts in the eighteenth century to avoid the absurdities of their rule of legal memory, and was derived by analogy from the limitation prescribed by the statute of 21 Jac. I. c. 21, for actions of ejectment. It is not founded on a belief that a grant has actually been made in the particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long-continued possessions."

In *Casey's Lessee v. Inloes*, 1 Gill, 503, which was an action of ejectment, the court of appeals of Maryland held that, where there had been a continuous possession of land for 20 years or upwards, by a party, or persons claiming under him, the court was authorized to instruct the jury, in the absence of a deed to such party, to presume that one had been executed to him. It also approved the refusal of the court below to instruct the jury that before they could find a title in the defendants, or any one of them, by presumption of a grant by the plaintiff or those under whom he claims, they must believe on their consciences, and find as a fact, that such grant was actually made. "The granting of such a prayer," said the court, "would have a tendency to mislead the jury, by inducing them to believe that a presumption of a grant could not be made unless the jury in point of fact believed in the execution of the grant; whereas it is frequently the duty of the jury to find such presumption as an inference of law, although in their consciences they may disbelieve the actual execution of any such grant."

In *Williams v. Donell*, 2 Head, 695, 698, which was also an action of ejectment, the supreme court of Tennessee, speaking on the same point, said: "It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that in reality a grant ever issued. It will be a sufficient ground for the presumption to show that by legal possibility a grant might have issued, and, this appearing, it may be assumed, in the absence of circumstances repelling such conclusions, that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law."

In accordance with the doctrine thus explicitly declared, there can be no doubt that the court below should have instructed the jury as requested. It would seem from the instruction given that the deed which the defendants insisted might be presumed was one from Ezekiel and Abigail Fuller, or from Abigail Fuller to Jeremiah Richardson. We think, however, that the facts point with equal directness to a conveyance from his grandfather. The codicil to his will, by which he devised the property to his

married daughter, was dated several years before his death, and there was no evidence that he was seized of it at that time, except the presumption arising from his having once possessed it. It does not appear that either the devisee or her husband ever exercised any acts of ownership in any way, or ever claimed to own it. After he left Smithfield, two of his children were supported by the town; and the agent of the town, appointed to search for any property belonging to the father, from the sale of which the children might be supported, reported that there was only the six-acre parcel, which was held by him in the right of his wife. He afterwards went to the poor-house, where he died in 1800. During the 39 years after he left Smithfield, and notwithstanding his having been part of that time in the poor-house, no word appears to have come from him asserting that he had any interest in the property. It is difficult to reconcile his conduct or that of his wife, the devisee, if in truth the testator continued the owner of the property until his death, and it passed under the codicil to his will. While Ezekiel Fuller was still living, and for several years after he had left Smithfield, Jeremiah Richardson, the testator's grandson, asserted ownership of the tract by its sale to Stephen Jencks by a deed with covenants of title and warranty, which was recorded in the town records. No word of opposition to this sale, or to the subsequent mortgage of the property by the grantee, was ever made, so far as the record discloses. The fact that Jeremiah Richardson was a minor when his grandfather died does not militate against the presumption of a deed to him. Nothing would be more natural than a deed of gift from the grandfather to the grandson. It would also seem from the charge of the court that in the deed from Jeremiah to Jencks he recited that the property had come from his honored grandfather, or words to that effect.

If, however, the evidence which, as the record says, tended to show that the devisee and her husband entered into the possession of the property devised, and the recital in his deed of April 11, 1761, of the 20-acre parcel, that it was bounded on the north by his former land, can be considered as rebutting the presumption of such a deed by the testator, then the defendants may fall back on the presumption of a deed to Jeremiah Richardson by Ezekiel and Abigail Fuller, the devisee, and her husband. There is nothing in the conduct or language of either of these parties which in any way repels such a presumption. Their silence and non-claim of the property would rather indicate that they had parted with their interest. The minority of Jeremiah at the time only shows his inability to purchase the property; but those under whose charge he was, could have purchased it for him, and had the deed executed to him. His orphanage may have induced such a proceeding. We

do not, therefore, think that his minority at the time can be urged against the presumption of a deed to him.

For the refusal of the court below to give the instruction requested, the case must go back for a new trial. We will add, moreover, that though a presumption of a deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet where no such facts are shown, and the things done, and the things omitted, with regard to the property in controversy, by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, then the jury may be instructed that it is their duty to presume such a conveyance, and thus quiet the possession. How long a period must elapse after the date of the supposed conveyance before it may be presumed to have existed has not always been a matter of easy determination. "In general," said this court, speaking by Mr. Justice Story, "it is the policy of courts of law to limit the presumption of grants to periods analogous to those of the statute of limitations in cases where the statute does not apply. But when the statute applies, it constitutes ordinarily a sufficient title or defense independently of any presumption of a grant, and therefore it is not generally resorted to. But, if the circumstances of the case justify it, a presumption of a grant may as well be made in the one case as in the other; and, when the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant within a period short of the statute of limitations." *Ricard v. Williams*, 7 Wheat. 59, 110.

The general statement of the doctrine, as we have seen from the authorities cited, is that the presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect; and hence, as a general rule, it is only where the possession has been actual, open, and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land, that the presumption of a deed can be invoked. But the reason for attaching such weight to a possession of this character is the notoriety it gives to the claim of the occupant; and, in countries where land is generally occupied or cultivated, it is the most effective mode of asserting ownership. But, as Mr. Justice Story observes in delivering the opinion of this court in *Green v. Litter*, 8 Cranch, 249:

"In the simplicity of ancient times there were no means of ascertaining titles but by the visible seizin, and, indeed, there was no other mode between subjects of passing title but livery of the land itself by the symbolical delivery of turf and twig. The moment that a tenant was thus seized he had a perfect investiture, and, if ousted, could maintain his action for the realty, although he had not been long enough in possession even to touch the esplees. The very object of the rule, therefore, was notoriety; to prevent frauds upon the land, and upon the other tenants." There may be acts equally notorious, and therefore equally evincive of ownership, which, taken in connection with a long possession, even if that possession has been subject to occasional intrusion, are as fully suggestive of rightful origin as an uninterrupted possession. Where any proprietary right is exercised for a long period, which, if not founded upon a lawful origin, would in the usual course of things be resisted by parties interested, and no such resistance is made, a presumption may be indulged that the proprietary right had a lawful origin. The principle is thus stated by Mr. Justice Stephen, of the high court of justice of England, in his Digest of the Law of Evidence, using the term "grant" in a general sense, as indicating a conveyance of real property, whether corporeal or incorporeal: "When it has been shown that any person has, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or license from the crown, or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested, if it had not had a lawful origin, there is a presumption that such right had a lawful origin, and that it was created by a proper instrument which has been lost." Article 100.

This presumption may therefore, in some instances, be properly invoked where a proprietary right has long been exercised, although the exclusive possession of the whole property to which the right is asserted may have been occasionally interrupted during the period necessary to create a title by adverse possession, if in addition to the actual possession, there were other open acts of ownership. If the interruptions did not impair the uses to which the possessor subjected the property, and for which it was chiefly valuable, they should not necessarily be held to defeat the presumption of the rightful origin of his claim to which the facts would otherwise lead. It is a matter which, under proper instructions, may be left to the jury.

In the present case, acts of ownership over the property in controversy by the ancestors in title of the defendants, so far as they could be manifested by written transfers of it, either as conveyances of title or by way of security, were exercised from 1768 for

more than a century. The first conveyance, from which the defendants trace their title, was duly recorded in the land records of the town soon after its execution in that year. The assessment of taxes on the property to those ancestors, and their payment of the taxes for 20 years between 1770 and 1805, and the assessment of taxes to them or to the defendants for 77 years after 1805, and the payment of the taxes by them, such assessment being required to be made, under the laws of the state, to occupants or owners of the land, are circumstances of great significance, taken in connection with their constantly asserted ownership. In *Ewing v. Burnet* this court speaks of the uninterrupted payment of taxes on a lot for 24 consecutive years as "powerful evidence of claim of right to the whole lot." 11 Pet. 54. Here, as seen, the taxes were uninterruptedly paid by the defendants or their ancestors in title for a much longer period.

In *St. Louis Public Schools v. Risley's Heirs* the supreme court of Missouri said: "Payment of taxes has been admitted in questions of adverse possession, and may have an important bearing, as it is not usual for one owning realty to neglect paying taxes for a period which would be sufficient to constitute a bar under the statute of limitations, or for one to pay taxes having no claim or color of title." 40 Mo. 370.

In *Davis v. Easley*, which was an action of ejectment, the supreme court of Illinois held that receipts for taxes paid by the plaintiff were admissible, and said: "The payment of taxes indicated that the plaintiff claimed title to the whole tract. It likewise tended to explain the character and extent of his possession." 13 Ill. 201.

In this case the ancestors of the defendants entered upon the land under claim of title, and opened and worked the ledge of rock running through it as early as 1835, and from 1846 they or their tenants or lessees continued, with occasional intervals, to work that ledge to the time of trial, in 1882, a period of 36 years; and it does not appear that during that time any one ever interfered with their work, or complained of it. To constitute an adverse possession, it was not necessary that they should have actually occupied or inclosed the land. It was sufficient that they subjected it to such uses as it was susceptible of, to the exclusion of others. *Ellicott v. Pearl*, 10 Pet. 442. That subjection might be shown by the quarrying of the ledge and the removal of the stone without disturbance or complaint from any quarter. The exclusive working of the quarry, under claim of title to the whole tract by virtue of conveyances in which it was described, might operate in law to carry the possession over the whole; and the payment of taxes thereon might authorize the jury to infer a continuous possession of the whole, notwithstanding any temporary and occasional intrusion by others upon a differ-

ent part of the tract, which did not interfere with the work.

The entry of the plaintiff with the attorney of his co-heirs, in 1874, and the delivery of the deed to him with a handful of earth, if weight and consideration are to be given to that proceeding under the circumstances in which it was made, would only reduce the period of undisturbed possession to 28 years. The cutting of wood on a different portion of the land by the Fullers for family use, or the manufacture of baskets, at occasional intervals during a portion of this period, though competent for the consideration of the jury, was not necessarily an interruption to the peaceable occupation of the land, so far as quarrying of the ledge and the removal of the stone were concerned, to which uses the defendants and their ancestors in title subjected it, and which appear to have constituted its principal value. Nor did it necessarily change the legal effect of the possession for quarrying the ledge with the attendant claim to the whole tract.

In *Webb v. Richardson*, the supreme court of Vermont, in speaking of interruptions in the actual occupancy of real property as affecting the claim of continuous possession, said: "To constitute a continuous possession, it is not necessary that the occupant should be actually upon the premises continually. The mere fact that time intervenes between successive acts of occupancy does not necessarily destroy the continuity of the possession. The kind and frequency of the acts of occupancy necessary to constitute a continuous possession depend somewhat on the condition of the property, and the uses to which it is adapted in reference to the circumstances and situation of the possessor, and partly on his intention. If, in the intermediate time between the different acts of occupancy, there is no existing intention to continue the possession, or to return to the enjoyment of the premises, the possession, if it has not ripened into a title, terminates, and cannot afterwards be connect-

ed with a subsequent occupation so as to be made available towards gaining title; while such continual intention might, and generally would, preserve the possession unbroken." 42 Vt. 465-473. That was an action of trespass for cutting timber on the land of the plaintiff, who was in possession at the time, and offered testimony to prove that his possession was earlier than the defendant's, and also that he had acquired the land by 15 years' adverse possession. The defendant did not show a chain of title back to the original proprietor of the land, but showed that his grantors entered into possession in 1835, and cut timber and claimed to own the land; and it was held that the question whether this entry interrupted the plaintiff's possession should have been submitted to the jury under proper instructions, in connection with the plaintiff's evidence of continuous possession under those through whom he claimed, and that it was error to refuse to submit it.

Our conclusion is that the claim to the land in controversy by the defendants and their ancestors in title for over a century, with the payment of taxes thereon, and acts of ownership suited to the condition of the property, and its actual use for 36 or 28 years, it matters not which, would justify a presumption of a deed to the original ancestor, Jeremiah Richardson, to quiet the possession of the defendants claiming under him, and the jury should have been permitted to presume such a deed without finding from the testimony that there was in point of fact a deed which was lost. If the execution of a deed was established, nothing further would be required than proof of its contents; there would be no occasion for the exercise of any presumption on the subject. It is only where there is uncertainty on this point that the presumption is indulged to quiet the possession.

The judgment of the court below must be reversed, and the cause remanded for a new trial.

NASHUA & L. R. CORP. v. BOSTON & L.
R. CORP. et al.

(10 Sup. Ct. 1004, 136 U. S. 356.)

Supreme Court of the United States. May 19,
1890.

Appeal from the circuit court of the United States for the district of Massachusetts.

Francis A. Brooks and *E. J. Phelps*, for appellant. *J. H. Benton, Jr.*, for appellees.

FIELD, J. This is a suit in equity to compel the defendant the Boston & Lowell Railroad Corporation to account for various sums of money alleged to have been received by it, and used for its benefit, to which the complainant was entitled, and also to charge the defendant Hosford personally with the amount diverted by him to that corporation. The controversy relates to certain transactions growing out of a joint traffic contract between the plaintiff and the defendant corporations. The plaintiff, the Nashua & Lowell Railroad Corporation, is alleged in the bill to have been duly established as a corporation under the laws of New Hampshire, and to be a citizen of that state. It will be convenient hereafter in this opinion to designate it as the "Nashua Corporation." On the 1st of February, 1857, it owned and operated a railroad extending from Nashua, in New Hampshire, to Lowell, in Massachusetts, a distance of 13 miles, of which 5 miles were in New Hampshire, and 8 miles in Massachusetts. The suit was brought not only against the Boston & Lowell Railroad Corporation, alleged in the bill to be a corporation duly established by the laws of Massachusetts and a citizen of that state, but against Hocum Hosford, its treasurer, and Charles E. A. Bartlett, of the city of Lowell, also citizens of that state; but as to Bartlett it has been dismissed. On the 1st of February, 1857, this corporation, which for convenience we shall call the "Lowell Corporation," owned and operated a railroad extending from Boston to Lowell, Mass., a distance of 26 miles, with a branch to the town of Woburn a mile and a half in length. On the 1st of February, 1857, the two corporations entered into a contract in writing with each other "for the promotion of their mutual interest through a more efficient and economical joint operation and management of their roads, and for the better security of their respective investments, as well as for the convenience and interest of the public," that their roads, with their branches, should be "worked and managed as one road," under certain conditions and stipulations which were stated at length. The contract recited that a large portion of the business of the two roads was joint business passing over the roads and through the branches of both parties, making desirable a common policy, and unanimity of management, and that, in the transaction of their business, there was a mutual interest, both as to the mode of transaction, and to the tariff upon the same, as well as in all other matters relating thereto, and that the two corporations, by operating under a com-

mon management, would thereby be enabled to do business with greater facility, greater regularity, and at a greater saving of expense.

The Nashua Corporation had at this time leases of the Stony Brook Railroad, extending from its line at North Chelmsford to Groton Junction, about 14 miles in Massachusetts, and of the Wilton Railroad, extending from Nashua to Wilton, about 13 miles in New Hampshire. The contract was originally for three years, but by a supplemental agreement of October 1, 1858, it was extended to 20 years. Among other things it provided that the roads of the parties should be "operated and managed by one agent, to be chosen by the concurrent vote of a majority of the directors of each party, and who might be removed by a like vote, or by the unanimous vote of either board," and that the respective boards of directors should "by such concurrent action exercise the same control over the management as is usual with boards of railroad directors in ordinary cases;" that the corporations should each surrender to the joint management thus constituted "the entire control of their respective roads, shops, depots, furniture, machinery, tools, or other property necessary for the proper maintenance and working of the joint roads," reserving only certain specified property necessary for the operation of the roads, consisting principally of real estate; that the contracts of the Nashua Corporation with the Wilton and Stony Brook roads should be assumed by the joint management, and carried out, and that the contract with the Wilton road, which was to expire on the 1st of April, 1858, might be renewed during the continuance of the joint management; that the Nashua Corporation should within the year 1857, at its own cost, erect a freight depot, with the necessary approaches and furniture, in the city of Lowell, upon its site at Western avenue, which during the continuance of the agreement might be used for the accommodation of the joint business; that the Lowell Corporation should complete within the year 1857, at its own separate cost, the new passenger depot at Causeway street in Boston, then under construction, together with the tracks, bridges, and all necessary fixtures connected with the extension into that city, and at its separate expense make such alterations in the existing Boston passenger depot as had been designed by the Lowell Corporation for converting it into a freight depot, and also without charge to the Nashua Corporation, complete at the earliest practicable time the crossing over the Fitchburg Railroad, and the connection with the Grand Junction Railroad; that the road-bed, bridges, superstructures, depots, buildings, and fixtures of each road should be kept as near as might be in like relative repair from their then state and condition, and that all casualties and damages to the same, except fire risks on buildings, should be at the common risk, and charged in the current joint account, and, in case of the destruction by fire of any buildings, or injury to the same, that the owners

should rebuild or replace them at his own cost; that the income and expense accounts of the joint roads should be made up, as nearly as conveniently might be, by estimate to the close of each month, and the net balance should be divided and paid over, on account, to the respective treasurers of the two corporations,—31 per cent. to the Nashua Corporation, and 69 per cent. to the Lowell Corporation,—subject to a final adjustment at the semi-annual closing of accounts, and that on the 1st days of April and October in each year the said accounts should be accurately closed and balanced by settlement with each party, covering and adjusting all previous payments on account,—the Nashua Corporation receiving as its proportion 31 per cent. of the said joint net income, and the Lowell Corporation receiving as its proportion 69 per cent. thereof; that each corporation might separately, and on its own account, declare such dividends upon its own stock, and payable from its own separate funds, as it might deem expedient; it being distinctly provided that “the interest upon the debts of either party must also be paid out of such separate share, and not from the common fund.” As thus seen, the contract provided that the two roads and their branches should be operated as a single road by a common agent to be appointed by the directors of both companies, and removable by them, or by the unanimous action of either; that the roads and property of each party should be kept in a like relative condition and repair as they then were at their joint expense; that the Nashua Corporation should in 1857 erect at its own expense a freight depot, with necessary approaches, in the city of Lowell, and the Lowell Corporation, in the same year, at its expense, complete a passenger depot, with necessary approaches, in the city of Boston, and alter the existing passenger depot there, also at its own expense, into a freight depot; that the interest upon the debts contracted by either party should be paid out of its own share, and not from the common fund; and that the net income should be divided in the proportion of 31 per cent. to the plaintiff, the Nashua Corporation, and of 69 per cent. to the defendant the Lowell Corporation, payments on account of such division to be made upon monthly estimates, and final settlement and adjustment to be had semi-annually. The contract did not provide that the property of either corporation should be improved, or other property be acquired by either, at the joint expense of both.

Under this contract, and during its continuance, the two corporations united their business and conducted it with marked success. By leases from other companies and the acquisition of branch roads a large mileage was added to their lines, and a correspondingly increased business was transacted by them. In 1874 the Nashua Corporation reported to its stockholders that the two corporations then operated under their joint management 135 miles,—more than double the mileage at the time the contract was entered into. It is stated that 33 miles of this distance

were added by the acquisition of the Salem & Lowell and the Lowell & Lawrence roads in 1858, and 16 miles of it by the purchase of the Lexington & Arlington road, in 1869. Contracts were made for business with connecting lines to such an extent that the two roads, during the late years of their joint operation, transported annually in the neighborhood of 300,000 tons of freight and 200,000 passengers. The net income resulting from this extended business was satisfactorily apportioned pursuant to the contract, 31 per cent. going to the Nashua Corporation, and 69 per cent. going to the Lowell Corporation, except as they were affected by two transactions of which the Nashua Corporation complains. One of these transactions was the alleged illegal appropriation by the Lowell Corporation of \$181,962 for a passenger depot at Boston erected by that corporation for its own benefit, and which, complainant contends, it was entitled to receive as its share of the net earnings of the joint management. The other transaction was the alleged illegal appropriation of \$26,124 for interest on the amount expended by the Lowell Corporation in buying a controlling interest in the stock of two other railroad companies,—the Lowell & Lawrence Company and the Salem & Lowell Company,—which the complainant contends it was also entitled to receive as its share of the net earnings of the joint management. It is to compel an accounting for these sums, and their payment to the complainant, that the present suit is brought.

Before passing, however, upon the validity of these claims a question raised as to the jurisdiction of the circuit court must be considered. Its jurisdiction was assumed upon the diverse citizenship of the parties, and, upon the allegations of the bill, rightfully assumed. Although a corporation is not a citizen of a state, within the meaning of many provisions of the national constitution, it is settled that, where rights of property or of action are sought to be enforced, it will be treated as a citizen of the state where created, within the clause extending the judicial power of the United States to controversies between citizens of different states. The plaintiff was created a corporation by the legislature of New Hampshire in June, 1835. It is, therefore, to be treated as a citizen of that state. *Railway Co. v. Whitton*, 13 Wall. 270, 283. But it also appears that in April, 1836, the legislature of Massachusetts constituted the same persons a corporation of that state, who had been thus incorporated in New Hampshire, giving to them the same name, and authorizing the new corporation to build that portion of the railroad between Nashua, in New Hampshire, and Lowell, in Massachusetts, lying within the latter state. It also appears that in April, 1838, the legislature of Massachusetts passed an act to unite the two corporations,—the one created by New Hampshire, and the one created by Massachusetts,—the first section of which was as follows: “The stockholders of the Nashua & Lowell Railroad Corporation, incorporated by the legislature of the state of New Hampshire in the

year one thousand eight hundred and thirty-five, are hereby constituted stockholders of the Nashua & Lowell Railroad Corporation, incorporated by the legislature of this commonwealth in the year one thousand eight hundred and thirty-six; and the said two corporations are hereby united into one corporation, by the name of the 'Nashua & Lowell Railroad Corporation;' and all the tolls, franchises, rights, powers, privileges, and property granted, or to be granted, acquired or to be acquired, under the authority of the said states, shall be held and enjoyed by all the said stockholders in proportion to their number of shares in either or both of said corporations." There were other provisions, designed to enable the two corporations to conduct their business as one corporation. The act, however, declared that it should not take effect until the legislature of New Hampshire had passed a similar act uniting the said stockholders into one corporation, nor until the acts had been accepted by the stockholders at a meeting called for that purpose. In June of the same year, 1838, the legislature of New Hampshire passed an act authorizing the two corporations to unite, and providing in such case that "all the toll, franchises, rights, powers, privileges, and property" of the two corporations should be held and enjoyed by the stockholders in each and both in proportion to their number of shares therein, and that all property owned, acquired, or enjoyed by either of the corporations should be taken and accounted to be the joint property of the stockholders of the two corporations, and that the two corporations should be one; the act to be in force when accepted by the stockholders of the corporations at a meeting called for that purpose. It does not appear, so far as disclosed by the record, except in the allegations of the defendant, that there was any formal acceptance of this act by the stockholders of the two corporations, but it would seem that the corporations acted upon its supposed acceptance; for the defendants pleaded to the jurisdiction of the court on the ground that, by the legislation mentioned, the complainant was not a corporation of New Hampshire, and consequently a citizen of that state, but was a corporation of Massachusetts, and thus a citizen of that state.

In the bill as originally filed, the Nashua Corporation was the only complainant. By a subsequent amendment, three persons, citizens of New Hampshire, stockholders of that corporation, were united as complainants. To the bill as thus amended the defendants pleaded as follows: "That this court ought not to take further cognizance of or sustain the said bill of complaint, because they say that they, the said defendants, at the time of filing said bill, were, and still are, all, each, and every one, citizens of the state of Massachusetts, and that said plaintiffs, at the time of filing said bill, were not, and still are not, all, each, and every one, citizens of another state, but that the said Nashua & Lowell Railroad Corporation, one of said plaintiffs, at the time of filing said bill, was, and still is, a corporation

duly established and existing under and by virtue of the laws of the state of Massachusetts, and a citizen of said state of Massachusetts, and at the time of filing said bill was not, and still is not, a corporation established and existing by the laws of the state of New Hampshire, and a citizen of said state of New Hampshire. All of which matters and things these defendants do aver to be true, and are ready to verify. Wherefore they plead the same to the whole of said amended bill, and pray the judgment of this honorable court whether they should be compelled to make any other or further answer to said bill." This plea was argued upon an agreement as to the facts. This plea was overruled, the court stating in its opinion that it seemed "that the defendant corporation might go into New Hampshire, and there sue the plaintiff as a New Hampshire corporation, in the federal court, although it could not bring such suit in the district of Massachusetts against the New Hampshire corporation, because no service upon the New Hampshire corporation as such could be got in this district, if for no other reason;" and adding that "if the defendant could sue the plaintiff in the federal court for New Hampshire, notwithstanding the fact of the plaintiff being chartered under the laws of both states, there would seem to be no good reason why the plaintiff, claiming under its New Hampshire charter, should not be allowed to sue the defendant in the federal court for Massachusetts, as it would be impossible for the defendant in such case to deny the title of the plaintiff as predicated upon the New Hampshire charter, or to deprive the plaintiff of the benefit of its New Hampshire citizenship thus acquired." 8 Fed. Rep. 458. A more satisfactory answer would, perhaps, have been that, whatever effect may be attributed to the legislation of Massachusetts in creating a new corporation by the same name with that of the complainant, or in allowing a union of its business and property with that of the complainant, it did not change the existence of the complainant as a corporation of New Hampshire, nor its character as a citizen of that state, for the enforcement of its rights of action in the national courts against citizens of other states. Indeed, no other state could by its legislation change this character of that corporation, however great the rights and privileges bestowed upon it. The new corporation created by Massachusetts, though bearing the same name, composed of the same stockholders, and designed to accomplish the same purposes, is not the same corporation with the one in New Hampshire. Identity of the name, powers, and purposes does not create an identity of origin or existence, any more than any other statutes alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute, and to the corporation created by it, there can be but one legislative paternity.

But on this point we will hereafter speak more at large. At present it is sufficient to say that the decision of the court overruling the plea in abatement upon the

facts agreed upon disposed of the question of jurisdiction in the court below. It is true the defendants, in their answers, subsequently filed, also made the same objection. Formerly the objection to the jurisdiction, from a denial of the complainant's averment of citizenship, could only be raised by a plea in abatement or by demurrer, and not by answer. *De Sobry v. Nicholson*, 3 Wall. 420, 423; *Sheppard v. Graves*, 14 How. 504, 509; *Wickliffe v. Owings*, 17 How. 47. This rule is modified by the act of March 3, 1875, determining the jurisdiction of the circuit courts of the United States. 18 St. p. 472, § 5. That statute provides that if, in any suit commenced in one of such courts, "it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." By this statute the time at which such objection may be raised is not thus restricted, but may be taken at any time after suit brought in the cases mentioned. The principal object of the statute was to relieve the national courts from the necessity of passing upon cases where it was plain that no question was involved within their jurisdiction, and thus free them from a consideration of controversies of a frivolous and questionable character, and to prevent fraudulent and collusive attempts to invoke the jurisdiction of those courts, as had frequently been the practice, by colorable transfers of property or chases in action from a citizen of one state to a citizen of another, to enable the latter to go into those courts; the original owner still retaining an interest in the property or chases in action transferred, or taking a contract for a retransfer of the same to himself after the termination of the litigation. In such cases it is undoubtedly the duty of the court below, of its own motion, to deny its jurisdiction, and of this court, on appeal or writ of error, to see that that jurisdiction has in no respect been thus imposed upon. *Morris v. Gilmer*, 129 U. S. 315, 326, 9 Sup. Ct. Rep. 289; *Farmington v. Pillsbury*, 114 U. S. 138, 143, 5 Sup. Ct. Rep. 807. If the question of jurisdiction could be raised in the answers of the defendants after the decision upon the issue on the plea in abatement, notwithstanding the decisions cited and the thirty-ninth equity rule of this court, the result in this case, though not perhaps in all cases, would be the same. Replications were duly filed to the answers, the effect of which was to deny the allegations respecting the acceptance of the acts having for their object the union of the two corporations, and those allegations were entirely unsupported by the evidence

or by anything in the record; and neither in the final decree of the court, nor in its opinion, was any allusion made to the subject. The only evidence bearing upon the question is found in the legislation of the two states, New Hampshire and Massachusetts; and it is plain, as already stated, that no legislation of Massachusetts could possibly affect the existence of the complainant as a corporation of New Hampshire, or its character as a citizen of that state. The act of New Hampshire of 1838, while in terms authorizing the two corporations to unite, did not confer any new franchise or right upon either of them. All that it did was to permit the funding or conversion of the separate interests of each stockholder in each corporation into a common or joint or undivided interest in both, and to declare that, after the two corporations were united, all property owned by either should be considered the joint property of the stockholders of both. There is nothing in these provisions looking to any abandonment of its corporate character as a creation of New Hampshire, or its citizenship of that state.

There are many decisions, both of the federal and state courts, which establish the rule that, however closely two corporations of different states may unite their interests, and though even the stockholders of the one may become the stockholders of the other, and their business be conducted by the same directors, the separate identity of each as a corporation of the state by which it was created, and as a citizen of that state, is not thereby lost. In *Farnum v. Canal Corp.*, 1 Sum. 46,¹ we have an instance of this kind. It there appeared that in January, 1823, the legislature of Massachusetts created a corporation by the name of the Blackstone Canal Company for the purpose of constructing a certain canal in that state. It also appeared that in June of that year the legislature of Rhode Island incorporated a company by the same name,—the Blackstone Canal Company,—and authorized it to construct a certain canal within the limits of that state. In May, 1827, the legislature of Rhode Island declared that the stockholders of the Massachusetts company should be stockholders in the Rhode Island company, as if they had originally subscribed thereto, if both corporations should agree thereto, and that the books and proceedings of the original and associated stockholders should be deemed the books or both; and the court held that, though the two corporations were created in adjacent states by the same name, to construct a canal in each of the states, respectively, and afterwards, by subsequent acts, were permitted to unite their interests, their separate corporate existence was not merged, and that the legislature only created a unity of stock and interest. In giving its decision the court, by Mr. Justice STORY, said: "Although, in virtue of these several acts, the corporations [one of Rhode Island, and one of Massachusetts] acquired a unity of interests, it by no means follows that they ceased to

¹ Fed. Cas. No. 4,675.

exist as distinct and different corporations. Their powers, their rights, their privileges, their duties, remained distinct and several, as before, according to their respective acts of incorporation. Neither could exercise the rights, powers, or privileges conferred on the other. There was no corporate identity. Neither was merged in the other. If it were otherwise, which became merged? The acts of incorporation create no merger, and neither is pointed out as survivor or successor. We must treat the case, then, as one of distinct corporations acting within the sphere of their respective charters for purposes of common interest, and not as a case where all the powers of both were concentrated in one. The union was of interests and stocks, and not a surrender of personal identity or corporate existence by either corporation." In *Muller v. Dows*, 94 U. S. 444, the bill averred that, of the three complainants, two were citizens and residents of the state of New York, and one a citizen and resident of the state of Missouri. The two original defendants were corporations, namely, the Chicago & Southwestern Railway Company, and the Chicago, Rock Island & Pacific Railroad Company; and they were alleged to be citizens of the state of Iowa. It was contended that the Chicago & Southwestern Railway Company could not claim to be a corporation created by the laws of Iowa, because it was formed by a consolidation of the Iowa company with another of the same name chartered by the laws of Missouri; the consolidation having been allowed by the statutes of each state. Hence it was argued that the corporation was created by the laws of Iowa and of Missouri; and, as one of the plaintiffs was a citizen of Missouri, it was urged that the circuit court had no jurisdiction. But the court replied, speaking by Mr. Justice STRONG: "We cannot assent to this inference. It is true the provisions of the statutes of Iowa respecting railroad consolidation of roads within the state with others outside of the state, were that any railroad company organized under the laws of the state, or that might thus be organized, should have power to intersect, join, and unite their railroads constructed or to be constructed in the state, or in any adjoining state, at such point on the state line, or at any other point, as might be mutually agreed upon by said companies, and such railroads were authorized 'to merge and consolidate the stock of the respective companies, making one joint-stock company of the railroads thus connected.' The Missouri statutes contained similar provisions, and with these laws in force the consolidation of the Chicago and Southwestern Railways was effected. The two companies became one, but in the state of Iowa that one was an Iowa corporation, existing under the laws of that state alone. The laws of Missouri had no operation in Iowa." The case of *St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co.*, which was before the circuit court of the United States for the district of Indiana, and is reported in 9 Biss. 144,² and

which came before this court under the title of *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, and is reported in 118 U. S. 290, 6 Sup. Ct. Rep. 1094, bears a strong resemblance to the one now before the court. In the bill the plaintiff was alleged to be a corporation created under the laws of Illinois, and the defendants were alleged to be corporations created under the laws of Indiana and of Pennsylvania. To the bill a plea was interposed in which it was alleged that, under various acts of the legislatures of Illinois and Indiana, two corporations were created,—one the plaintiff, the St. Louis, Alton & Terre Haute Railroad Company, and the other the same company in name in Indiana; that they had been consolidated by those states, and were so inseparably connected together that the plaintiff was really a corporation as well of Indiana as of Illinois; and that, as some of the defendants were corporations of the state of Indiana, the court could not take jurisdiction of the case. But the court held that the fact that the two corporations created by different states had been consolidated under the laws of those states, and that the railroad was operated by virtue of that consolidation as one entire line of road, did not prevent one of those corporations from bringing suit in the federal court, as a corporation of the state where it was created, against the corporation with which it was consolidated, which was created by the other state. Said the court, speaking by Judge DRUMMOND: "If the defendant corporation, though consolidated with another of a different state, can be sued in the federal court in the state of its creation, as a citizen thereof, (referring to the cases of *Railway Co. v. Whitton*, 13 Wall. 270, and *Muller v. Dows*, 94 U. S. 444,) why can it not sue as a citizen of the state which created it? I can see no difference in principle. It seems to me that when the plaintiff comes into the federal court, if a corporation of another state, it is clothed with all the attributes of citizenship which the laws of that state confer, and the shareholders of that corporation must be conclusively regarded as citizens of the state which created the corporation, precisely the same as if it were a defendant. So I do not see why, if the plaintiff in this case alleges, as it does, that it is a corporation created by the laws of Illinois, it cannot institute a suit in the circuit court of the United States of Indiana against a corporation of that state." The case turned upon the point whether the plaintiff corporation of Illinois had become also an Indiana corporation, so as to lose its existence or identity and citizenship as an Illinois corporation. The court held in the negative, that it still remained an Illinois corporation, with all its rights of action as such in the United States courts. When the case came to this court the decision of the court below was affirmed, but it would seem that when it was considered here the plea to the jurisdiction filed in the court below had been withdrawn. The question of jurisdiction was, however, examined by the court of its own motion. "It does not seem," said the court, "to admit of ques-

² Fed. Cas. No. 12,237.

tion that a corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also; and so a corporation of Illinois, authorized by its laws to build a railroad across the state from the Mississippi river to its eastern boundary, may, by the permission of the state of Indiana, extend its road a few miles within the limits of the latter, or indeed through the entire state, and may use and operate the line as one road by the permission of the state, without thereby becoming a corporation or a citizen of the state of Indiana. Nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the state of Indiana as have been conferred on it by the state which created it, constitutes it a corporation of Indiana." And again: "In a case where the corporation already exists, even if adopted by the law of another state, and invested with full corporate powers, it does not thereby become such new corporation of another state until it does some act which signifies its acceptance of this legislation, and its purpose to be governed by it. We think what has occurred between the state of Indiana and this Illinois corporation falls short of this."

Many cases might be cited from the state courts illustrative and confirmatory of the doctrine of this case. In *Racine & M. R. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 331, it appeared that in April, 1852, the legislature of Wisconsin incorporated the Racine, Janesville & Mississippi Railroad Company, and that the legislature of Illinois, in February, 1853, incorporated the Rockton & Freeport Railroad Company,—both companies authorized to construct railways; that in February, 1854, these two companies entered into an agreement to fully merge and consolidate their capital stock, powers, privileges, immunities, and franchises. In February, 1855, both the legislature of Illinois and the legislature of Wisconsin changed the name of the two companies to that of the Racine & Mississippi Railroad Company. It also appeared that in 1851 the Savannah Branch Railroad Company was organized under the general railroad law of Illinois, and that in January, 1856, this company entered into articles of agreement with the Racine & Mississippi Railroad Company by which its stock was consolidated with that of the latter company; that a majority in interest of the stockholders of the Savannah Company ratified the articles; and that in 1857 the legislature of Illinois changed the name of that company to the Racine & Mississippi Railroad Company. Thus the names of three railroad companies, created by three different states, were changed to the same name, and were allowed to be consolidated together and act as one company. The supreme court of Illinois held that this consolidation did not convert them into one company in fact. Said the court: "Our view of the effect of the consolidation contract between the Rockton Company [of Illinois]

and the Wisconsin company, which we hold to have been legally made, is briefly this: While it created a community of stock and of interest between the two companies, it did not convert them into one company in the same way and to the same degree that might follow a consolidation of two companies within the same state. Neither Illinois nor Wisconsin, in authorizing the consolidation, can have intended to abandon all jurisdiction over its own corporation created by itself. Indeed, neither state could take jurisdiction over the property or proceedings of the corporation beyond its own limits; and, as is said by the court in *Railroad Co. v. Wheeler*, 1 Black, 297, a corporation "can have no existence beyond the limits of the state or sovereignty which brings it into life, and endows it with its faculties and powers." In *Bridge Co. v. Adams Co.*, 88 Ill. 619, the plaintiff was a consolidated corporation, so called, created by the laws of Illinois and Missouri for bridging the Mississippi river between those states. The plaintiff, a bridge company, to avoid taxation in Illinois, claimed to be a corporation of both states, and not of either alone. The court in its opinion said: "It is said by appellants, this corporation, although it derived some of its powers, and in part its corporate existence, from this state, [Illinois,] derived an equal part from the sovereign state of Missouri, and therefore they are not a corporation created under the laws of either state. To this it is answered, and we think satisfactorily, that the legislatures of this state and of Missouri cannot act jointly, nor can any legislation of the last-named state have the least effect in creating a corporation in this state. Hence the corporate existence of appellants, considered as a corporation of this state, must spring from the legislation of the state which by its own vigor performs the act. The states of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two states without being a corporation of each state or of either state." In *Railroad Co. v. Auditor General*, 53 Mich. 91, 18 N. W. Rep. 586, it appeared that the general railroad law of Michigan made roads that lie partly within and partly without the state taxable on so much of their gross receipts as corresponded to the ratio of their local to their entire length. A local company was consolidated with a foreign one that controlled a number of other consolidated roads, and several leased lines besides; and in considering the effect of the consolidation the court said, speaking by Chief Justice COOLEY: "It is familiar law that each corporation has its existence and domicile, so far as the term can be applicable to the artificial person, within the territory of the sovereign creating it. * * * It comes into existence there by an exercise of sovereignty will; and, though it may be allowed to exercise corporate functions within another sovereignty, it

is impossible to conceive of one joint act, performed simultaneously by two sovereign states, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created; but, when the two unite, they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges."

It would seem clear, from the decisions we have cited, as well as on general principles, that the plaintiff in this case must be considered simply in its character as a corporation created by the laws of New Hampshire, and as such a citizen of that state, and so entitled to go into the circuit court of the United States, and bring its bill against a citizen of any other state, and that its union or consolidation with another corporation of the same name, organized under the laws of Massachusetts, did not extinguish or modify its character as a citizen of New Hampshire, or give it any such additional citizenship in Massachusetts as to defeat its right to go into the circuit court of the United States in that district. If the position taken by defendants could be maintained, then they could sue in the federal court in New Hampshire the New Hampshire corporation, while that corporation could not enforce its claims in the federal court of Massachusetts against the Massachusetts corporation. From the cases we have cited, it is evident that by the general law railroad corporations created by two or more states, though joined in their interests, in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity, and that each one has its existence and its standing in the courts of the country only by virtue of the legislation of the state by which it is created. The union of name, of officers, of business, and of property does not change their distinctive character as separate corporations.

We turn now to a consideration of the claims put forth by the plaintiff for a restoration to it of moneys appropriated to the use and for the benefit of the defendant corporation. As seen by the provisions of the joint traffic contract given above, the Lowell Corporation was to complete the construction of a passenger station, with all necessary approaches, in the city of Boston, in 1857, at its own expense, and to alter the passenger depot then existing thereinto a freight depot, also at its own expense, and the Nashua Corporation was at its own expense to erect a freight depot at the city of Lowell for the accommodation of the joint business; and in case of destruction of buildings belonging to either party, or damage to them by fire, they were to be rebuilt or replaced by the owner. As observed by counsel, it would appear that, when entered into, it was not the intent of the contract that either party should be charged for improvements, additions, or even restorations in the real es-

tate or terminal facilities of the other. But, with the increase of business under the joint management, it became evident, if the business was to be retained, that larger terminal facilities at Boston were necessary; and the character and extent of the needed improvements were the subject of frequent consideration among the directors of the two companies. In the mean time the construction of another passenger station there was commenced by the Lowell Company; and, at a meeting of the directors of the Nashua Corporation on the 23d of July, 1872, it was voted as follows: "That the expenditures made and to be made by the Boston & Lowell Railroad Corporation for land and building in Boston for a new station, and the expenditures made and to be made by said corporation for the building and completing the Mystic River Railroad, and for the improvements in Winchester for a new station and land for railway purposes, to the amount of \$20,000, are to be treated in the management of the business, under the joint business contract existing between said corporation and the Nashua & Lowell Railroad Corporation, as follows, viz.: The said Boston & Lowell Railroad Corporation are to be paid the interest upon such expenditures made and to be made at the rate of seven per cent. per annum, at the end of each six months, out of the receipts of the joint corporations under said contract, and which is to be charged as a part of the expenses of operating said railways under said contract; and the cashier of said two corporations, and treasurer of the Boston & Lowell Railroad Corporation, is hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due to the Boston & Lowell Railroad Corporation out of the joint receipts of said two corporations." Under the authority of this vote, there was deducted from the net earnings of the joint management the interest on the expenditures incurred in the construction of the passenger station in the city of Boston at the rate of 7 per cent.; the same being treated as operating expenses of the road. The amount of the net earnings thus diverted from the Nashua Company, being 31 per cent. of the interest on the whole expenditure incurred, is alleged to have been \$181,962; and the right to thus appropriate those earnings depends upon the sufficiency of that authority.

The question thus presented is not free from difficulty. As a general rule, we should not hesitate to say that the directors of the Nashua Company could not authorize, without the previous approval of its stockholders, the construction of a passenger station at a city in a state foreign to that in which it was created, and to which its own road did not extend, or the payment of any portion of the cost of the construction. Such expenditures would not be considered as falling within the ordinary scope of their powers. See *Railway Co. v. Allerton*, 18 Wall. 233; *Davis v. Railroad Co.*, 131 Mass. 258, and cases there cited, particularly *Colman v. Railway Co.*, 10 Beav. 1, and *Bagshaw v. Rail-*

way Co., 7 Hare, 114. But the fact that the increased facilities provided at Boston were necessary to enable the joint management to retain its extended business, in which the Nashua Company was of course directly interested, changes the position of the directors of that company with reference to such expenditures, and brings them within the general scope of the directors' powers. Such is the conclusion of a majority of the court, and therefore the suit cannot be maintained for the restoration to the complainant of moneys thus expended, which otherwise would have gone to it as net earnings of the joint management. But the purchase of the controlling interest in the stock of the Lowell & Lawrence and of the Salem & Lowell Railroad Companies stands upon a different footing. That was a matter solely for the Lowell Corporation. The purchase was never authorized by any vote of the directors of the Nashua Company. At the time those roads were under lease to the Lowell Corporation, and had been taken into the joint account, and the net earnings divided between the two corporations in the same ratio as were the earnings of their own roads. This gave to the Nashua Corporation all the benefits that could possibly arise from the ownership by the Lowell Corporation of a controlling interest in their capital stock. The additional burden of the purchase

could in no way, therefore, be cast upon the Nashua Corporation without the consent of its stockholders; and no such consent was given either by them, nor, as already said, was any given by its directors. The pretense for the purchase was that the leases were invalid, and that other parties might otherwise obtain control of those roads, and thus injuriously affect the business of the joint management. The charter of the complainant did not extend to the purchase of controlling interests in the railroads of other states under the apprehension that such roads might become business competitors. The complainant is therefore entitled to an accounting by the Lowell Company for the net earnings of the joint management which were appropriated towards the interest on the sums expended in the purchase of the stock of those companies, and to the payment of the amount found due to it upon such accounting. The decree of the court below will be reversed, and the cause remanded for further proceedings in accordance with this opinion; and it is so ordered.

BLATCHFORD, J., did not sit in this case, or take any part in its decision.

FULLER, C. J., and GRAY and LAMAR, JJ., dissent on the question of jurisdiction.

MILLER v. CITY OF INDIANAPOLIS et al.

(24 N. E. 228, 123 Ind. 196.)

Supreme Court of Indiana. April 1, 1890.

Appeal from circuit court, Hendricks county; JOHN V. HADLEY, Judge.

Action by Catherine A. Miller against the city of Indianapolis and another. There was judgment for defendants, and plaintiff appeals.

Wm. Watson Woollen and Wm. E. Niblack, for appellant. *Wm. L. Taylor, Denny & Elliott*, and *A. L. Mason*, for appellees.

COFFEY, J. A controversy arose in this case, in the circuit court, as to whether it was an action to quiet title, or an action to obtain an injunction. Acting upon the theory that it was an action to obtain an injunction, the circuit court refused the request of the appellant for a trial by jury, and also overruled the application of the appellant for a new trial as of right. The complaint in the cause, omitting the caption and the description of the land in controversy, is as follows: "Catherine A. Miller, plaintiff, complains of the city of Indianapolis, Leander A. Fulmer, and George W. Seibert, defendants, and says that she is the owner of the following described real estate; * * * that said defendants have unlawfully, wrongfully, illegally, and forcibly taken possession of the same, and, without having condemned the same, are threatening to do great and irreparable damage to the same, in this: that they are threatening to cut down the trees and vines that have been placed thereupon and have been grown thereon by the plaintiff, and are threatening to plow the land and grade the same, and are threatening to make a street over and upon it; and this she avers they are doing without leave or license from her, and with full notice that she is the owner thereof, and under a claim that said real estate is a public street in said city. She therefore prays that, as against said defendants, her title be quieted to said real estate, and that said defendants may be forever enjoined from further trespassing thereon, and damaging the same."

It is conceded by both parties, in their briefs and in the argument of his cause, that every pleading must proceed upon some single definite theory, which must be determined by its general scope and character, and that the prayer for relief does not determine the character of the pleading, nor assign to it any particular theory. *Bank v. Root*, 107 Ind. 224, 8 N. E. Rep. 105; *Houck v. Graham*, 106 Ind. 195, 6 N. E. Rep. 594. This complaint is destitute of some of the allegations found in an ordinary complaint to quiet title. Indeed, there is no pretense that any one or all of the defendants make any claim to the title to the land in controversy. While it is true that cities, by their common councils, have the control of the streets and alleys within their territorial limits, it cannot be correctly said that they own such streets and alleys. A grant or dedication of a street is a grant or dedica-

tion to the public, and not to the city. In the case of *Conner v. New Albany*, 1 Blackf. 45, it was said by this court: "That which is granted to New Albany cannot be 'public,' in the unqualified sense of the word; nor can that which is granted to the public be in any sense the exclusive property of New Albany. A grant of a public street of highway, through either town or country, cannot be considered otherwise than as a grant to the public." See, also, *City of Evansville v. Evans*, 37 Ind. 229.

The complaint, however, does contain all the necessary allegations for an injunction in cases of threatened irreparable injury. High, *Inj.* §§ 701, 702. It is to be gathered from the complaint that the city of Indianapolis claims that the strip of ground in controversy is a public street, and that, acting upon that claim, the other defendants in this action were proceeding to cut down the trees and vines growing thereon, plow up and grade the same as a street, to the irreparable injury of the plaintiff. In such case the only adequate remedy of the appellant was by injunction. In no other case would the charge that appellees were about to do the appellant irreparable injury find an appropriate place. We are of the opinion that this complaint must be regarded as a complaint to enjoin the appellees from the commission of the threatened injury therein set forth, and that it proceeds upon the theory that the appellant had no other adequate remedy. It follows that the circuit court did not err in refusing the request of the appellant for a jury trial, as the trial of actions for injunctions belongs exclusively to the court. Nor did the court err in overruling the application of the appellant for a new trial as of right, as such right does not extend to actions for injunctive relief. *Liggett v. Hinkley*, 120 Ind. 387, 22 N. E. Rep. 256. The defense relied upon by the appellees was that the strip of ground in controversy had been dedicated to the public as a street, by commissioners appointed by the Marion county civil circuit court, in a partition suit pending in that court in the year 1868. A certified copy of the record and proceeding in that cause was read in evidence on the trial of this cause, over the objection of the appellant.

It is not seriously contended that the court had no power to order the land involved in that suit laid off in lots, blocks, streets, and alleys, but, as the plat prepared by the commissioners to plat the land and make partition of the same is not set out in this record, it is earnestly contended that the decree in partition is void for uncertainty. It appears by the record read in evidence that Susan L. Davidson and the appellant in this cause instituted, in the Marion circuit court in the year 1868, a partition suit against Noah N. Davidson and others, in which it was alleged that the plaintiffs therein and the said Noah N. Davidson were the owners and tenants in common of a certain described tract of land, including the land in controversy, each of said parties owning an undivided one-third thereof. During the pendency of the action the appellant intermarried with one Miller, which fact was suggested

to the court, and the said Miller was made a party plaintiff with his wife, the appellant herein. Upon a trial of the cause, and after the court had entered an interlocutory decree for partition, and had appointed commissioners to make partition, the record recites that "it is further ordered, with the assent of all the parties, that the commissioners be directed to lay off said premises into lots, blocks, streets, and alleys, to facilitate such partition." At a subsequent day in the term, being the 31st day of December, 1868, the commissioners reported to the court that, after being duly sworn, and having received a copy of the order of the court, they proceeded, with the assistance of a surveyor, and laid off the land described in the order into lots, blocks, streets, and alleys, and that they had made a plat thereof, which they then reported to the court for approval. At the close of this report the following record entry was made: "Whereby it appears to the court that the said commissioners have laid off the said premises into lots, blocks, streets, and alleys, and it is now agreed to by the said parties that said premises should be laid off into lots, blocks, streets, and alleys, the same is hereby confirmed; and the said plat is ordered to be recorded in the recorder's office of Marion county, Indiana, and thereupon shall have the same validity in law as if made by a legal proprietor of such land of full age." On the same day the said commissioners filed their report of partition, in which they reported that they had set off and partitioned to the said Noah N. Davidson, blocks 3, 4, 7, 19, and 20, in Davidson's third addition to the city of Indianapolis; to Catherine A. Miller, (this appellant,) blocks 5, 6, 8, and 15, (homestead,) in the same addition; and to Susan L. Davidson, blocks 10, 11, 12, 13, 14, 16, 17, and 18, in Davidson's third addition to the city of Indianapolis. This report was approved by the court, and a judgment of partition was entered of record accordingly. The court having jurisdiction of the subject-matter, and of the persons of the parties to this suit, it cannot be reasonably contended that its judgments and decrees in the premises are void, unless they are so uncertain that it is impossible to ascertain therefrom what land was set off and partitioned to each of the parties. Doubtless it would have been much better to set out in the record the plat prepared by the commissioners, dividing the land into lots, blocks, streets, and alleys, as that would have relieved the record from any uncertainty, and would have rendered the controversy we are now considering impossible; but still, if the record furnishes the means by which it can be definitely ascertained what the share assigned to each of the parties in the partition thus made is, we do not think it is void. It is not the office of a description to identify property, but its office is to furnish the means of identification. *Boyd v. Doty*, 8 Ind. 370; *Peck v. Sims*, 120 Ind. 345. 22 N. E. Rep. 313. For the means of identifying the property set off to the respective parties to this suit, we are referred, by the record, to the plat prepared by the commissioners, under the order of the court to lay

the land off into lots, blocks, streets, and alleys, and we are to look for that plat in the recorder's office of Marion county, where the same is ordered to be recorded. If, when found and properly identified, the property set off to each can be ascertained, we know of no reason why it should not be as effectual as if copied into the record of the partition proceedings. The office of a description has been fulfilled, and the means of identification are at hand. It is plain, therefore, that the record of the proceedings in partition now before us is to be considered and construed in connection with the plat prepared by the commissioners, if that plat can be found and identified, for such plat is, in fact, a plat of the proceedings in that case.

Over the objection of the appellant, the appellees read in evidence, on the trial of this cause, what purported to be a certified copy of the record of the plat above referred to, as taken and copied from one of the plat-books in the recorder's office of Marion county. It is contended by the appellant that, as this plat is a part of the proceeding in the partition suit, it should have appeared in the record in that cause, and should have been recorded in the deed record, under the provisions of the act of March 5, 1859, found on page 760, 1 Rev. St. 1876, and that there was no law in force authorizing its record in the plat-book of the recorder's office. When this evidence was offered by the appellees, it was objected to by the appellant upon the grounds—*First*, that the record and certificate show that it is a certified copy of the plat-book of Marion county, Ind.; *second*, that there is no law in this state which authorizes the recording of a plat in the plat-book; *third*, that under the law in this state there is no such thing known as a plat-book to be kept by the recorder; *fourth*, that the statutes of this state require that when a plat is made it shall be recorded in the record of deeds of the county, and this does not purport to be from such record; *fifth*, that it was immaterial, irrelevant, and incompetent, and that there is no issue in the case under which it is admissible.

An examination of this plat discloses the fact that it embraces the same land described in the partition proceeding set out above. It divides the land into lots, blocks, streets, and alleys, and purports to have been signed and acknowledged by the commissioners appointed by the court to divide the same, and make partition. It refers to the partition case by title and number, and designates it as "Davidson's Third Addition to the City of Indianapolis," and bears date the 31st day of December, 1868, the date on which the record in the partition proceeding informs us that it was acknowledged and approved by the court. It was recorded in plat book No. 3, in the office of the recorder of Marion county, on the 9th day of January, 1869. There is little room for doubt that the paper before us is a copy of the plat made by the commissioners in the partition suit to which the appellant was a party. The serious question is as to whether it comes to us in the shape of legitimate evidence. Our attention has not been called to any

express statutory provision authorizing what is known as a "plat-book." While the law not only authorizes, but absolutely requires, that plats of towns and cities, and additions thereto, shall be recorded, it seems to be silent as to the name of records in which they shall be so recorded. We must take notice, however, of the fact, as part of the current history of the public business of the state, that books known as "plat-books" are and have been for many years kept by the county recorders in the various counties of the state, in which are recorded the plats of the towns and cities, and the additions thereto, and that such books are kept as public records. In procuring such records, the county recorders no doubt acted upon the correct presumption that, where the law required that a particular class of instruments should be recorded, and made no provision for any specific book in which they should be so recorded, it was their duty to procure suitable records for that purpose. Indeed, frequent reference is made to such records in the statutes of the state, and they have frequently been recognized by legislative enactment as legal public records. With this knowledge before it, the legislature enacted section 3253, Rev. St. 1881, which provides that "the acknowledgments of all plats of towns and cities, and of all additions thereto, heretofore taken and certified by any officer provided for in section 3374, are hereby legalized; and the recording of such plats and additions as have heretofore been acknowledged before and certified by any officer provided for in said section is hereby declared to be valid and effectual in law to all intent and purposes." In view of these facts, and in view of the statute above quoted, we are constrained to hold that the plat-book from which the plat before us was copied is a legal public record, in which the plat prepared by the commissioners in the partition suit before us was properly recorded. To hold otherwise would be to adjudge that most, if not all, of the plats prepared in the last 30 or 40 years have never been properly recorded, and would tend to great confusion and much inconvenience. We are of the opinion that the certified copy of the plat before us was properly admitted in evidence, provided there was an issue in the cause under which it was admissible.

The only pleading filed by the appellees was a general denial, and whether the plat was admissible in evidence under that plea depends upon what fact it tended to prove. The appellant's right to recover in the action rested upon the assumption that she was the owner of the strip of land in controversy at the time of the commencement of her suit. Whatever tended to prove that she was not such owner was admissible under a denial of the allegation that she was the owner. We think the plat read in evidence, when taken in connection with the other evidence in the cause, tended to show that she was not such owner. Pom. Rem. §§ 666-673. The land in controversy consists of a strip 60 feet wide, extending east and west through the entire width of the tract of land described in the partition proceeding above

set out. Its length is 1012 feet, and its width is 60 feet. As shown by the plat before us, it is bounded on the north by a tier of blocks, numbered, respectively, 12, 13, 14, and 15, the last being the homestead and one of the blocks assigned to appellant in the partition proceeding. It is bounded on the south by blocks numbered 5, 6, 7, 8, 9, 10, and 11. The first lots above named front south on this strip, and the last named front north on the strip. It is not named on the plat as a street, but it intersects Preston street on the west, and is marked with the figures "60" at each end. Upon the trial of the cause the appellant proposed to prove, by competent oral testimony, that in laying off this addition to the city of Indianapolis it was not the intention of the commissioners who platted the same to dedicate this strip to the public as a street, to which offered testimony the court sustained an objection, and the appellant excepted. At the time this evidence was offered by the appellant it was in proof that all the property abutting on this strip had passed into the hands of third parties, either by way of direct conveyance, or by means of mortgages executed by the parties to whom the blocks had been assigned in the partition suit. In these several conveyances and mortgages the land is described by blocks, as it is described in the plat prepared by the commissioners to plat the same, and as it is described in the report of partition made by said commissioners. The city of Indianapolis, acting upon the assumption that this strip had been dedicated to the public as a street, had accepted it as such, and was proceeding to grade and improve it.

It is not contended by the appellant that this strip of land is either a lot, block, or alley. It is neither a lot, block, street, nor alley. It is a strip of land left by the commissioners appointed to make partition, wholly undivided. In their report to the court the commissioners reported that they had divided the land intended for partition into lots, blocks, streets, and alleys, and in their report of partition they informed the court that they had assigned to each of the parties interested in said land his or her share in the same, in severalty. No person examining these proceedings would be led to believe that any portion of the land described therein was left undivided, but, on the contrary, when examining the plat in connection with the report of the commissioners in partition, and the judgment of the court thereon, would be led to the belief that the strip in controversy was intended as a 60-foot street, furnishing an outlet for the blocks abutting thereon. If the strip had been designated "Miami Street," or a street by any other name, it would not be contended that the appellant could not show by parol testimony that it was not intended to dedicate it as a public street. Marking a street upon a plat of an addition to a town or city, and selling lots with reference thereto, constitutes a dedication. *Faust v. City of Huntington*, 91 Ind. 493; *City of Evansville v. Page*, 23 Ind. 525; *City of Logansport v. Dunn*, 8 Ind. 378; *City of Indianapolis v. Kingsbury*, 101 Ind. 200. As to whether a plat contains an ex-

press dedication of a strip of ground to the public, as a street, is a matter of law for the court. *Hanson v. Eastman*, 21 Minn. 509; *Yates v. Judd*, 18 Wis. 118; *Sanborn v. Railway Co.*, 16 Wis. 19. In *City of Indianapolis v. Kingsbury*, supra, it was said by this court: "But the intention to which courts give heed is not an intention hidden in the mind of the land-owner, but an intention manifested by his acts. It is the intention which finds expression in conduct, and not that which is secreted in the heart of the owner, that the law regards. Acts indicate the intention, and upon the intention, clearly expressed by open acts and visible conduct, the public and individual citizens may act." "The question whether a person intends to make a dedication of ground to the public for a street or other purpose must be determined from his acts and statements explanatory thereof, in connection with all the circumstances that surround and throw light upon the subject, and not from what he may subsequently testify as to his real intention in relation to the matter." *City of Columbus v. Dahn*, 36 Ind. 330; *Lamar Co. v. Clements*, 49 Tex. 347; *City of Denver v. Clements*, 3 Colo. 487. An implied dedication may be rebutted by parol testimony, but where the dedication is express, evidenced by a recorded plat, the intent, as expressed in

such plat, cannot be contradicted by parol. *City of Indianapolis v. Kingsbury*, supra, and authorities there cited. When the plat before us is construed in connection with the partition proceedings of which it constitutes a part, as the same is explained by the report of the commissioners in partition and the judgment of the court thereon, no other reasonable conclusion can be drawn than that the strip of land in controversy was intended as a 60-foot street, for the benefit of the block abutting thereon, and as furnishing a means of ingress and egress to the same. Relying on this dedication, the property adjoining this strip has passed into the hands of third parties, and the city of Indianapolis, accepting such dedication, is proceeding to improve the strip as a street. To permit the appellant to say, now, that this strip was left by the commissioners as undivided land, and was not intended as a street, would be obviously unjust to those who purchased the property on the faith of the plat and the partition proceeding. We do not think the court erred in refusing to admit this offered testimony. We find no error in the record for which the judgment should be reversed. Judgment affirmed.

ELLIOTT, J., took no part in the decision of this cause.

BURTON v. TUITE, City Treasurer.

(45 N. W. 88, 80 Mich. 218.)

Supreme Court of Michigan. April 18, 1890.

On petition for *mandamus*.

Act Mich. 1889, No. 205, provides that the officers having the custody of any county, city, or town records shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their offices, and for making memoranda or transcripts therefrom, to all persons having occasion to make examination of them for any lawful purpose.

Henry A. Chaney, for relator. *John W. McGrath*, for respondent.

MORSE, J. The respondent is city treasurer of Detroit. The relator is engaged in the abstract business in said city. We held, upon application of the relator for *mandamus*, (see *Burton v. Tuite*, 44 N. W. Rep. 282,) that certain records in said treasurer's office were public records, and that relator had a right to examine them, and to make memoranda or transcripts therefrom under Act No. 205, Pub. Acts 1889, subject to such proper and reasonable regulations as the treasurer might make consistent with the public use of such records. Our order in the case, as made and entered in the journal on the 8th day of January, 1890, commanded the said Tuite not only to allow the relator to inspect and examine the particular records involved in that case, but also to generally furnish to him and his subordinates reasonable and proper facilities for the inspection and examination of the records and files in his office, and for making memoranda and transcripts therefrom in compliance with said above-named act of the legislature. In the opinion, as well as in the order, of this court we meant to so express our views and commands as that there should be no mistake or misunderstanding as to the rights and duties of the respective parties to this controversy. But we are now called upon to enforce our order. January 13, 1890, a petition was filed in this court by the relator showing the proper service of our writ of peremptory *mandamus* upon respondent, and setting forth that, notwithstanding our order and command therein contained, the respondent had since said service refused to allow relator to have access to or look at certain other public records in said office of the city treasurer, to-wit: One book containing the record of the certificates of tax-sales that have been canceled; one book containing a list of such lots as have been sold to the city of Detroit, or to individuals, for special city taxes, and have been from time to time redeemed; and a book containing a list of such lots or parcels of land in the city of Detroit as have been heretofore sold to said city for delin-

quent city taxes, said sales being afterwards assigned by the city to individuals. Upon this petition, January 15, 1890, we issued an order to the said Thomas P. Tuite, to show cause why he should not be punished for contempt and disobedience of the said writ of *mandamus* of date January 8, 1890. Respondent answered this order on the 28th day of January, 1890, denying that the above-named books were public records, or that the relator had any right to examine them under the statute, or our decision and order above stated. The books in question were denominated by the respondent as "Stub Receipt Books," and it was insisted in said answer that the same were not public records, but mere memoranda for the convenience of the office, and that all the *data* contained therein is entered in the "Record Books," which are accessible to relator. It was, however, admitted upon the argument that the transferring of the *data* upon these stub books to the record books might be delayed for days or weeks, at the pleasure of the respondent. After hearing both parties by counsel upon the petition and answer, we directed certain interrogatories to be served upon the respondent, to be answered by him under oath, and that other proofs be taken touching the truth of the matters involved in the petition and answer, as well as the nature and character and use of said books. The answers to said interrogatories and other testimony taken have been returned to us. We do not intend to again go into the discussion of the questions that were settled by us in the first opinion filed in this case. We are satisfied that the books referred to, by whatever name they are called, are public records in the treasurer's office, in the full sense of the statute, and under the opinion above referred to; that the respondent is guilty of contempt and disobedience of the order of this court in refusing to the relator the privilege of examining them, and making transcripts thereof. We think, however, that this disobedience has occurred, not so much from a willful disregard of our command, as from bad advice. Under the circumstances, we are not disposed to impose a heavy penalty, but we hope that our orders will hereafter be strictly complied with, and without delay or attempted evasion, as the fine in this case will not stand as a precedent in any future case of disobedience of the mandates or decrees of this court. An order will be entered adjudging the said Thomas P. Tuite guilty of contempt and disobedience of our aforesaid writ of *mandamus*, and that he pay to the people of the state of Michigan a fine of \$25, with the costs of this proceeding to be taxed by the clerk of this court; such payment to be made to said clerk within 10 days after a copy of this order shall be served upon him. The other justices concurred.

BLALOCK v. MILAND.

(13 S. E. 551, 87 Ga. 573.)

Supreme Court of Georgia. July 13, 1891.

RECORDING DEED—GIFT—LOSS OF DEED—SECONDARY EVIDENCE—NOTICE TO PRODUCE—DELIVERY—DECLARATIONS OF DONOR—INSTRUCTIONS.

1. A deed saying nothing of delivery in the attestation clause is nevertheless prepared for record if attested by two witnesses, one of whom was the clerk of the superior court, who signed the attestation in his official character.

2. In order for the heir of a deceased donee to set up a deed of gift made to her by her father it is not necessary that it should appear that the donee or her heir ever had possession of the premises, or that either of them ever had actual custody of the deed.

3. When it appears that an original deed of gift by a father to his daughter was never in the actual custody of the daughter; that the father is dead; and that the deed was not among the papers left by him,—the loss of the original is sufficiently accounted for to admit a copy taken from the record.

4. The donor, after making a deed of gift, having sold and conveyed the premises to other persons, there is no presumption that the deed of gift, which was adverse to their title, ever went into their possession; and consequently, whether a notice to one of them was properly directed, or a subpoena *duces tecum* to the other was properly served, is immaterial, there being no diligence to inquire of them incumbent upon the party now claiming under the deed of gift.

5. Declarations of a vendor, now deceased, made at the time of conveying to his vendee, that a previous deed of gift executed by the vendor to his daughter had never been delivered, and that he had destroyed the same, are not admissible in evidence in favor of the vendee against the heir of the daughter claiming under the deed of gift; nor are declarations of a third person, now deceased, that he knew the deed had not been delivered, and that the donor destroyed it.

6. A written declaration, made by the donor, and recorded in the record of deeds, to the effect that he had not delivered to his daughter the deed of gift, and that he revoked and annulled the deed, is not admissible in evidence in favor of his vendee of the premises, the same being made several years after the deed of gift was executed and recorded.

7. It is not incumbent upon the court to specify in his charge to the jury what facts and circumstances would negative the presumption that a duly recorded deed was delivered, or to go over the various facts and circumstances in the evidence tending to negative that presumption, there being no request to do so, and the court referring the jury in general terms to the evidence on the subject.

8. The evidence warranted the verdict.

(*Syllabus by the Court.*)

Error from superior court, Pike county; James S. Boynton, Judge.

S. N. Woodward, for plaintiff in error.
Claude Worrill and B. F. McLaughlin, for defendant in error.

PER CURIAM. Judgment affirmed.

WEAVER v. SHIPLEY et al.

(27 N. E. 146, 127 Ind. 526.)

Supreme Court of Indiana. March 31, 1891.

Appeal from circuit court, Tippecanoe county; D. P. VINTON, Judge.

Jay H. Adams and Caffroth & Stuart, for appellant. *Wallace & Baird*, for appellees.

MILLER, J. The appellees commenced this action to enjoin the appellant, Elmore Weaver, and one Bahlah W. Weaver, from interfering with certain premises which it was alleged the appellees and one Underhill had leased from said Bahlah W. Weaver. The defendants answered by a general denial. There was a trial by the court, and finding against the appellant, Elmore Weaver, and judgment rendered against him enjoining him from interfering with the leased premises, and for \$100 damages, and in favor of Bahlah W. Weaver for his costs. The appellant, Elmore Weaver, assigns error as follows: (1) Because the court erred in overruling his separate demurrer to the amended complaint; (2) because the court erred in its conclusions of law, and each of them; (3) because the court erred in overruling his written motion for a new trial; (4) because the court erred in overruling his motion to modify the judgment; (5) because the court erred in overruling his motion in arrest of judgment; (6) because the amended complaint does not state facts sufficient to constitute a cause of action against him.

The material allegations of the complaint, omitting descriptions and formal parts, are that on the 1st day of March, 1883, the plaintiffs and defendant Underhill were desirous of procuring ground upon which to erect a tile-mill for the manufacture of tile, and from which to obtain clay to be used in such manufacture; that on that day they applied to the defendant Bahlah W. Weaver, who was the owner of the real estate, to lease the same for that purpose; that on said day the plaintiffs and Underhill, and the defendant Bahlah W. Weaver, entered into an agreement, whereby said Bahlah agreed to and did lease to them for the term of 10 years, for the purposes aforesaid, three several tracts of real estate lying adjoining and contiguous to each other, for which they were to pay him as rent \$75 per year, in tile, at the market price; that, at and prior to the making of said lease, the plaintiffs and said Weaver went upon and over the three tracts of land so leased, and mutually pointed out and agreed upon the location of the same; that it was agreed as a part of the contract that the plaintiffs were to have all the clay suitable for tile upon the three-cornered tract which they might use during the terms of the lease, and, if they needed it, all the clay on all the tracts of land, but they were to use and occupy no more of the land or clay than they needed for use during the term of the lease; that after they had agreed upon the terms of said lease and had pointed out and agreed upon and located by actual view the three tracts of land, they attempted to reduce said contract of lease to writing, and attempted to describe therein the said

land leased to them, and that they did sign and execute a written agreement of lease in which they attempted to describe, and thought they had sufficiently described, each of the tracts of land so pointed out, located, agreed upon, and leased as aforesaid, which written contract is in the words and figures following, to-wit: "March the first, 1883. Articles of agreement made and entered into between B. W. Weaver and James Shipley, Allen Shipley, and William Underhill, to-wit: B. W. Weaver agrees to rent to the parties of the second part ground to set a tile-mill and shedding and kiln, not to exceed (4) acres of ground, it being in the north-west corner of the north-east quarter of the south-east quarter of section (27,) town (24,) range (3) west; also a strip of land ten feet wide, on the west side of the east line running north and south, for the purpose of making tile, it being east side of the north-west quarter of the south-east quarter section (27,) town (24,) range (3) west; also a three-cornered piece in the north-east corner of the last-described land; and to have all the clay they want for tile in the three-cornered piece, keeping south line parallel with the congressional survey of the land; and also one house and stable and garden and smoke-house, the last-described property in the south-west corner of the south-east quarter section (27,) town (24,) range (3) west. This lease is to run ten years from date. The parties of the second part agree to pay the party of the first part seventy-five dollars annually in tile, at the market price of such tile at the kiln as the party of the first part may choose. If the parties of the second part, failing to pay the amount, forfeit all rights to the above-named premises, and the parties of the second part want a way out to the east road of the woods pasture, they must hang a good and substantial gate, and keep the same shut. B. W. WEAVER. JAMES SHIPLEY. ALLEN J. SHIPLEY. WM. UNDERHILL." That immediately after the making of said contract, and the execution of said lease, and in pursuance thereof, they entered upon and took possession of all said real estate pointed out, and relying upon said contract, and their ability to hold all of said lands for the term agreed upon, they, with the knowledge and consent of said Weaver, proceeded to and did erect various buildings of a permanent nature, particularly described, and also constructed a barbed-wire fence around the tract, costing in the aggregate in the neighborhood of \$2,700; that after the erection of said mill and other buildings, and during the year 1883, the plaintiffs began to make, and ever since have made and sold, large quantities of tile, and with the knowledge and consent of said Bahlah W. Weaver they entered upon the three-cornered tract, and have ever since continued to take clay therefrom, and use the same in the construction of tile, with the knowledge and consent of Bahlah W. Weaver and Elmore Weaver; that they have only removed the clay from a half acre of said three-cornered piece; that last fall Bahlah W. for the first time intimated that the plaintiffs had no

right to remove clay from the so-called three-cornered piece of land, but they continued without molestation to remove clay therefrom until the close of the tile season; that Elmore Weaver claims to have purchased, in February, 1887, from Bahlah W., twenty acres of land, covering and including the so-called three-cornered tract of land, and since that time he and the defendant Bahlah have forbidden the plaintiffs from removing clay therefrom; that Underhill has sold and assigned his interest in the contract and lease to the plaintiffs; that Elmore Weaver, who is the son of Bahlah W., had full knowledge of the making of the contract and lease at the time of the execution thereof, and of the exact location of said three-cornered tract, and knew where the same was located and agreed upon by the parties, and had full knowledge of the improvements, and that they had made the same on the faith of said contract and lease, and full knowledge of the fact that it was absolutely necessary for them to have this tract in order to carry on their tile business, at the time he purchased the land; that the plaintiffs had no other place from which to obtain clay for their tile-mill, and that they cannot in that neighborhood procure any other place from which to obtain the same, and that unless they can obtain said clay their contract of lease will become wholly valueless, and their tile-mill and improvements will be wholly lost; that their lease has six years to run, and there is an abundance of clay in the three-cornered piece to last during the time it has to run; that the defendant Elmore Weaver forbade the plaintiffs from entering on said three-cornered piece of land, or removing clay therefrom, and tore down the gate and bridge-way which the plaintiffs had constructed for the purpose of driving to said tract of land, and set fire to the bridge; and that he now threatens that he will, by force and violence, keep the plaintiffs away from said tract, and from removing clay therefrom; and that the defendants Weaver and Underhill are, by force and threats of personal violence, preventing the plaintiffs from entering upon or removing clay from said tract, and will continue to do so unless enjoined by this court, to their irreparable damage; that the plaintiffs have fully complied with all the agreements and stipulations on their part, and have promptly and fully paid their rent as stipulated for in said lease, and that they have been damaged in the sum of \$2,000. The prayer is for damages and an injunction.

The objection to the sufficiency of the complaint pointed out by the appellant is that the description of the land leased from Bahlah W. Weaver, as set out in the written lease, is so indefinite and uncertain as to render the contract void. More fully stated, the position of the appellant is (1) that the lease is void because there is no description of the land proposed to be leased, and that this defect cannot be supplied by parol evidence; and in support of their position they cite *Dingman v. Kelly*, 7 Ind. 717; *Howell v. Zerbee*, 26 Ind. 214; *Pulse v. Miller*, 81 Ind. 191; *Baldwin*

v. Kerlin, 46 Ind. 426; *Miller v. Campbell*, 52 Ind. 125. And (2) that, the lessee having taken possession by virtue of the written agreement, he becomes a tenant by virtue of his acts, and such tenancy is from year to year. *Railsback v. Walke*, 81 Ind. 409; *Friedhoff v. Smith*, 13 Neb. 5, 12 N. W. Rep. 820; *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. Rep. 787. (3) That as to the "three-cornered" tract, the lease being void, the right to take clay was a mere license, not assignable and revocable at pleasure. *Armstrong v. Lawson*, 73 Ind. 498. The authorities cited establish the proposition that a lease or contract for the conveyance of land must, to be enforced, contain a description of the land; that where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract; but that courts never permit parol evidence to be given first to describe the land, and then to apply the description, nor to contradict the written agreement, but only in aid of it. *Baldwin v. Kerlin*, supra. Tested by this rule, the description of the "three-cornered" tract of land seems to be so deficient as to require an entirely new description to identify the land, and this cannot be furnished by parol evidence, as it would be substantially the making of a new contract by parol, which is forbidden by the statute of frauds. If this suit was an action to enforce a contract entirely executory in its character, the authorities cited would be conclusive against the appellees. It remains, therefore, to inquire as to the effect of the partial performance set out in the complaint, and proven on the trial. The complaint proceeds upon the theory that the parties made a parol contract for the lease of the lands for the period of 10 years; that the land to be let was identified and pointed out, and all the terms and stipulations of the contract fully understood and agreed to, and that afterwards the parties undertook to reduce their agreement to writing, but failed to sufficiently describe the land, and that, therefore, the contract, resting partly in writing and partly by parol, was in law a parol contract, (*Pulse v. Miller*, 81 Ind. 191; *Board v. Shipley*, 77 Ind. 553;) and as such parol contract it was taken out of the operation of the statute of frauds by part performance. The right, in a proper case, to enforce such a contract, is impliedly admitted in *Railsback v. Walke*, 81 Ind. 409. In *Pom. Spec. Perf.* § 101, it is said: "As the statute speaks of lands, or any interest in or concerning them, contracts to lease are both included within its terms, and are capable of being part performed so as to be taken out of the operation of the statute." The case of *Fery v. Pfeiffer*, 18 Wis. 535, is much in point, where an agreement for a lease was taken out of the operation of the statute by partial performance. Also *Seaman v. Ascherman*, (Wis.) 8 N. W. Rep. 818; *Wallace v. Scoggin*, (Or.) 21 Pac. Rep. 558; *Morrison v. Herrick*, 130 Ill. 631, 22 N. E. Rep. 537; *Martin v. Patterson*, (S. C.) 2 S. E. Rep. 859. In the language of *BERKSHIRE, J.*,

in *Swales v. Jackson*, 26 N. E. Rep. 62, (this term,) the appellees having "entered into possession of the real estate under the contract, and having made lasting and valuable improvements, it would be inequitable and a fraud to withhold the title." In 1 Wood, Landl. & Ten. § 200, it is said that "a court of equity will decree a specific performance of such contracts, notwithstanding the statute of frauds, when there has been such a part performance of the agreement that to refuse it would work a fraud upon the party seeking its specific execution."

The only infirmity in the written lease is its failure to sufficiently describe the leased premises. We are informed by the complaint that the premises were pointed out and agreed upon at and prior to the making of the contract, and that soon after the appellees took possession of the same, and made lasting and valuable improvements, such as they would not have made had they not relied upon the agreement to hold the same for the full period of 10 years. The agreement as to the boundaries of the leased land, and its occupancy for four years, with the knowledge and consent of the landlord, is an important element in the partial performance relied upon; for it furnishes clear and satisfactory evidence in favor of the appellees, upon the only proposition not established by the written instrument. The misdescription of the leased property would not have furnished the tenants with a defense, if they had been sued by the landlord for rent for the time they occupied the property. *Whipple v. Shewalter*, 91 Ind. 114. The practical location of the boundaries of the leased premises, coupled with the subsequent possession of the same by the tenants, by and with the landlord's knowledge and consent, is a sufficient location of the property. *Jackson v. Perrine*, 35 N. J. Law, 137; *Lush v. Druse*, 4 Wend. 313; *Pierce v. Minturn*, 1 Cal. 470; *Richards v. Snider*, 11 Or. 197, 3 Pac. Rep. 177. While the rules of construction to be applied in identifying boundaries in a lease are the same as those applicable to grants in fee, it is common, especially in the leasing of farm lands, to use less accuracy in the description of the premises, than in deeds conveying the fee; and where the parties themselves put a practical construction on the contract, and the premises are taken possession of and occupied under the lease by the consent of both parties, it should be sufficient to take the contract out of the operation of the statute, where the only infirmity in

the contract is the insufficiency of the description of the land. The court did not err in overruling the demurrer to the complaint.

The court made a special finding of the facts and conclusions of law; but, as the record fails to show that it was at the request of either of the parties, it is to be treated as a general finding, (*Hasselman v. Allen*, 42 Ind. 257; 1 Work, Fr. § 804;) and consequently the court did not err in its conclusions of law.

The only other points urged in their brief by counsel for the appellant are that the court erred in admitting illegal evidence. The first relates to the action of the court in permitting the appellees to read in evidence the exhibit purporting to be a copy of the written lease without first showing the loss of the original. It appears that originally but one copy was executed, but afterwards the parties met, and drew off a copy of the original, and all the parties signed it, and the copy so made was delivered to the appellees, being the one given in evidence. The new paper thus made was, to all intents and purposes, a duplicate, and was delivered to the appellees to subserve the purposes of an original instrument. At all events, it was a written instrument signed by Bahlah W. Weaver, and admissible against him and his privies in estate.

Objection is also made to the action of the court in permitting witnesses to state what the parties to the lease said to each other prior to the execution of the written agreement which led to its execution. The portion of the record where these questions and answers are set out has not been pointed out; but, if they had been, we are unable to see how the court could have held the complaint good, and then prevented the plaintiffs from introducing the only class of evidence by which it could be proven.

Lastly, it is said that evidence should not have been received showing that there was no clay in the neighborhood suitable for making tile, except in one of the tracts leased. No objection is pointed out, except that it was immaterial. The evidence tended directly to establish one of the material allegations of the complaint, and was not only competent, but important, to show the condition the appellees were left in by the interference of the appellant, and also to fix the damages they were entitled to recover because of the interference with their leased premises. We find no error in the record. Therefore the judgment is affirmed.

RICHMOND & D. R. CO. v. JONES.

(9 South. 276, 92 Ala. 218.)

Supreme Court of Alabama. April 16, 1891.

Appeal from circuit court, Jefferson county; JAMES B. HEAD, Judge.

Action by D. W. Jones against the Richmond & Danville Railroad Company for personal injuries alleged to have been caused by defendant's negligence. There were three counts in the complaint. The first count sought to recover on the ground that the injuries were caused by reason of defects in the condition of the ways, works, machinery, or plant connected with or used in the employ of defendant. In the second count of the complaint the plaintiff based his right of recovery on the alleged negligence of the employes of the defendant who had charge and control of the train by which plaintiff was injured, and at the time of the accident. The third count was for failure of the fireman on defendant's engine to transmit plaintiff's signal to the engineer. The defendant pleaded the general issue, and by special plea pleaded a written contract of employment entered into between the plaintiff and the defendant on February 17, 1890,—not quite two months before the accident,—one of the terms of which was in words as follows: "Rule 23. The conditions of employment by the company are that the regular compensation paid for the services of employes shall cover all risks incurred and liability to accident from any cause whatever while in the service of this company. If an employe is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized. Allowances, when made in such cases, will be as a gratuity, justified by the circumstances of the case, and previous good conduct of the party. The fact of remaining in the service of the company will be considered acceptance of these conditions. All officers employing men to work for this company will have these conditions distinctly understood and agreed by each employe before he enters the service of the company." A demurrer to the plea was sustained. There was judgment for the plaintiff, and defendant appeals.

James Weatherly, for appellant. *Bowman & Harsh*, for appellee.

COLEMAN, J. The suit was brought by appellee to recover damages for personal injury. For defense to the action by way of special plea the defendant set up rule No. 23, which will be found in the statement of the facts of the case. To this plea a demurrer was sustained. In the case of *Railroad Co. v. Orr*, (Ala.) 8 South. Rep. 360, it is declared that "railroads cannot stipulate for immunity from liability for their own wrongful negligence. A rule which imposes upon an employe to look after and be responsible for his own safety contravenes the law itself which fixes the liability of railroads for negligence causing injury or death to their employes." The demurrer was properly sustained.

It is the duty of railroads to keep themselves reasonably abreast with improved methods so as to lessen the danger attend-

ant on the service, and, while they are not required to adopt every new invention, it is their duty to adopt such as are in ordinary use by prudently-conducted roads engaged in like business and surrounded by like circumstances. *Railway Co. v. Propst*, 83 Ala. 518, 3 South. Rep. 764. There have been such advancements in science for the control of steam, and improvements in the machinery and appliances used by railroads for the better security of life, limb, and property, it would be inexcusable to continue the use of old methods, machinery, and appliances known to be attended with more or less danger, when the danger could be reasonably avoided by the adoption of the newer, and which are in general used by well-regulated railroads. Not that it is required of them to adopt every new invention useful in the business, although it may serve to lessen danger; but it is their duty to discontinue old methods which are insecure, and to adopt such improvements and advancements as are in ordinary use by prudently-conducted roads engaged in like business and surrounded by like circumstances. *Railroad Co. v. Allen*, 78 Ala. 494. Applying this principle in the case of *Railway Co. v. Propst*, 83 Ala. 526, 3 South. Rep. 764, the court held that, "if the draw-heads and bumpers used by defendant were such as were employed by many well-conducted roads, this would repel all imputation of negligence founded on their mere structure, although other roads, even a majority of them, adopted a different pattern. Witnesses who have sufficient knowledge of the subject may testify to the general rules of railroads on the subject." The same general principle is declared in the case of *Railroad Co. v. Hall*, 87 Ala. 722, 6 South. Rep. 277. Under these rules, we think it was proper to inquire whether the draw-heads used by defendant when the injury occurred were such as were usually used on well-regulated railroads. The witnesses were shown to be experts, and were competent to give such testimony. It may be laid down generally that objections to evidence, which do not particularize or define the grounds of objection, may be overruled. The court is not bound to cast about for the grounds upon which, in the minds of counsel, they are rested. *Dryer v. Lewis*, 57 Ala. 551; *Steele v. Tutwiler*, Id. 113; *Oil Co. v. Perry*, 85 Ala. 164, 4 South. Rep. 635. The rule is equally well established that a general objection to evidence, a part of which is legal, may be overruled. *Fonville v. State*, (Ala.) 8 South. Rep. 688; *Giddens v. Bolling*, (Ala.) 9 South. Rep. 274, (present term); *Warren v. Wagner*, 75 Ala. 188; *Chambers v. Ringstaff*, 69 Ala. 140. Most of the objections to the evidence come under one or the other of these principles, and there was no available error in overruling them.

Defendant's counsel, having the paper, Exhibit A, in his hands, handed it to plaintiff while on cross-examination as a witness, and asked him if he signed it. Plaintiff's counsel requested to see the paper, which request defendant's counsel refused, saying he had not offered it in evidence. The court stated that it should be

shown to plaintiff's counsel when the paper was offered in evidence. Plaintiff then answered that it was his signature. The defendant afterwards offered the paper in evidence, to which the plaintiff objected, on the grounds that there was an attesting witness, and the execution of the paper had not been properly proven. (Opposing counsel have the right to object to improper questions to witnesses, and the rules of practice require them to specify the grounds of objection. Any advantage taken, by which a party is deprived of the exercise of this right in the trial of a case without neglect or fault on his part, should not be used to his prejudice. If defendant did not purpose to introduce the paper in evidence, the question to the witness was improper. If it was the intention to offer it in evidence, then it should have been submitted to opposing counsel, so that, if he wished to object, the objection could be made in proper form. The ruling of the court sustaining the objection to the introduction of the paper is supported also on other principles. The case of *Ellerson v. State*, 69 Ala. 3, after stating the general rule that the attesting witness should be called to prove the execution of an instrument, declares that the rule extends to every private writing which the parties may have chosen to cause to be attested. The witness is considered as the person selected and referred to for the purpose of proving the fact of execution, and the facts and circumstances attending it; citing 1 Greenl. Ev. § 569. So long as the evidence of the subscribing witness can be produced, it is the best—the primary and only—evidence of execution. The admissions or declarations of the parties themselves to the instrument (not made in open court, or in writing, for the purpose of a trial, when they are the parties litigant) are not admissible for this purpose. *Russell v. Walker*, 73 Ala. 317. It is contended that Exhibit A was not offered in evidence as a contract binding upon plaintiff, but merely to establish the existence of rule 20, and notice to plaintiff, and for this purpose it was admissible. The proposition contended

for necessarily must be that, the rule being incorporated in the contract as a part of it, its existence and materiality as evidence against the plaintiff may be established by offering in evidence the contract without legal proof of its execution. The reasoning is not sound. To establish the existence of the rule and notice thereof the defendant was forced to rely upon an unproven contract. If the contract is excluded because its existence is not proven, it cannot be said that admissions which alone appear in the contract have been proven. If plaintiff had not admitted his signature, the paper would not have been offered in evidence. The admission having been improperly obtained, and the execution of the paper not proven, it was not admissible for any purpose.

There is evidence that the running-board upon which the evidence tends to show the plaintiff was standing when injured "was put there for the switchmen to ride on." If this evidence is true, and it was placed there to assist switchmen in the performance of their duties, and they were expected to use it for that purpose, and the plaintiff in the discharge of his duty as switchman was upon the running-board, rule No. 20 could not be invoked to defeat plaintiff's action, so far as the rule prohibits switchmen from going between the cars to couple or uncouple them. *Hissong v. Railroad Co.*, (Ala.) 8 South. Rep. 776; *Railroad Co. v. Walters*, (Ala.) Id. 357.

The evidence tended to show that it was the duty of firemen to receive signals from switchmen, and transmit them to the engineer. If the injury to plaintiff was caused by negligence of the fireman in transmitting the signals to the engineer, given to him for that purpose by the plaintiff in the discharge of his duty as a switchman, such injury is clearly within the provision of the employe's act.

There was no error in the charges given by the court, and those asked for by the defendant, which were refused, were not in accord with the principles of law herein declared, and were properly refused.

Affirmed.

STERBINS v. DUNCAN et al.

(2 Sup. Ct. 313, 108 U. S. 32.)

Supreme Court of the United States. March 5, 1883.

In error to the circuit court of the United States for the Northern district of Illinois.

Geo. O. Ide and John W. Ross, for plaintiff in error. Thomas Dent, for defendants in error.

Mr. Justice WOODS, delivered the opinion of the court.

This was an action of ejectment, originally brought by William B. Morris, in the circuit court of the United States for the Northern district of Illinois, against Howard Stebbins, the plaintiff in error, for the recovery of a quarter section of land, originally situate in Madison county, Ill., but, when the suit was begun, situate in Stark county. Before the final trial of the cause, to-wit, on January 22, 1879, the death of the plaintiff was suggested, and the devisees named in the last will were made parties, as appears by the following entry upon the record of the court:

"Now come the parties by their attorneys, and Thomas Dent, Esq., the attorney of the plaintiff, suggests to the court the death of William B. Morris, and that Maria L. Duncan, Harriet B. Cooledge, and Helen Cooledge are the devisees of said deceased; and, on motion of the plaintiff's attorney, it is ordered by the court that said devisees, Maria L. Duncan, Harriet B. Cooledge, and Helen Cooledge, be made plaintiffs herein."

The defendant pleaded the general issue. The cause was tried by a jury, who returned a verdict for the plaintiffs, upon which judgment was rendered in their favor for the lands in controversy. To reverse that judgment, the defendant in the circuit court has brought the case here upon writ of error. A bill of exceptions was taken upon the trial, from which the following statement of the case is made:

Disregarding the order in which the testimony was introduced, and arranging it chronologically, the plaintiffs below, to prove title in themselves, offered the following evidence:

(1) An exemplification of a patent from the United States to one John J. Dunbar for the lands in controversy; (2) a certified copy of a deed for the same lands from John J. Dunbar to William Prout, dated January 6, 1818, said copy being certified to have been made February 3, 1875; (3) a certified copy of a deed for the same lands from William Prout to Joseph Duncan, dated May 2, 1834, and recorded in said county October 29, 1838; (4) certified copy of a decree in chancery in the United States circuit court for the district of Illinois, dated June 9, 1846, rendered in a cause wherein the United States were complainants and the widow and heirs of Joseph Duncan defendants, and of the proceedings under said decree by which the premises in

controversy in this suit were sold to the United States; (5) certified copy of the deed to the United States under said decree for the same premises, made by William Thomas, commissioner, dated August 12, 1846, and recorded January 17, 1848; (6) certified copy of a deed for the same premises, dated December 28, 1847, and recorded June 5, 1848, to William W. Corcoran, executed by R. H. Gillett, solicitor of the treasury, in behalf of the United States; (7) certified copy of a deed for the same premises, dated December 20, 1867, and recorded March 12, 1868, from William W. Corcoran to William B. Morris; (8) certified copy of the will of William B. Morris and of the probate thereof, from which it appeared that Maria L. Duncan, Harriet B. Cooledge, and Helen L. Cooledge, the plaintiffs, were his residuary legatees.

To sustain the title, which the plaintiffs contended that they derived through these documents, they offered other evidence, which will be noticed hereafter, but they offered no evidence of the death of William B. Morris, the original plaintiff, since the certified copy of his will and of the probate thereof, and the letters testamentary issued thereon.

The defendant Stebbins, to show title in his lessor, offered in evidence the following title papers:

(1) An exemplification of a patent by the United States to John J. Dunbar, dated January 6, 1818, for the lands in controversy; (2) a certified copy from the recorder's office in Stark county, Ill., in which county the land is situate, of a deed, dated January 6, 1818, from John J. Dunbar to John Frank, conveying said land in fee, and recorded in said county June 18, 1870; (3) other title deeds, by which the title passed from the heirs of John Frank to Benson S. Scott; (4) the stipulation of plaintiffs that Stebbins, the defendant, was in possession of the land in controversy at the commencement of the suit under said Benson S. Scott as his tenant only, and, at no time, under any other claim.

No exceptions were taken by the plaintiffs to the introduction of these title papers by the defendant.

The real contest in the case was between the title of the plaintiffs deduced through the deed of Dunbar to Prout, and their subsequent muniments of title put in evidence, and the title of defendant derived through the deed of Dunbar to Frank, and the subsequent conveyances put in evidence by him.

The defendant was in possession of the premises sued for. His evidence, which was not excepted to, gave him a prima facie title, and, unless the plaintiffs showed a better title, they should not have recovered the lands in controversy. It is, therefore, only necessary to consider the title which the plaintiffs claim to have shown in themselves. The errors assigned all relate to the admission by the court below of the evidence offered by the plaintiffs to sustain their title, and the charge of the court to the jury upon the effect of

that evidence. These assignments of error we shall now proceed to consider.

The court admitted as evidence tending to prove the death of William B. Morris, the original plaintiff, the duly-certified copy of his will, and of the probate thereof in the probate court of the county of Suffolk, in the state of Massachusetts, and of the letters testamentary issued thereon, and the court charged the jury, in effect, that this evidence, uncontradicted, was sufficient to show the death of Morris. The admission of this evidence and the charge of the court thereon are assigned for error.

Whether the evidence objected to was or was not competent and sufficient to prove the death of Morris, it was clearly competent, the death of Morris being proved, to show title in the plaintiffs. The objection to its admissibility must, therefore, fall, if there was other evidence to show *prima facie* the death of Morris. We think that the suggestion in the record of the death of Morris, and the order of the court making his devisees parties, was sufficient for this purpose.

Section 10 of chapter 1 of the Revised Statutes of Illinois, p. 94 (Hurd, 1880), provides that "when there is but one plaintiff, petitioner, or complainant in an action, proceeding, or complaint in law or equity, and he shall die before final judgment or decree, such action, proceeding, or complaint shall not, on that account, abate if the cause of action survive to the heir, devisee, executor, or administrator of such decedent; but any of such to whom the cause of action shall survive may, by suggesting such death upon the record, be substituted as plaintiff, petitioner, or complainant, and prosecute the same as in other cases."

The suggestion of the death of Morris, the sole plaintiff, was made in this case, as the record shows, by counsel for the devisees, both parties being present, and the court made the order, without objection, that the devisees be made plaintiffs in the case. We think that this suggestion, made without objection, and the order of the court thereon, settles *prima facie*, for the purposes of this case, the fact of the death of the original plaintiff. The statute provides upon whose suggestion of the death of a sole party plaintiff the court shall make his heir or devisee, etc., plaintiff in his stead. It certainly cannot be the fair construction of the statute that a party may stand by and see the suggestion of the death of the opposing party entered of record, and his heir or devisee substituted in his stead, and upon final trial require further proof of the death, at least without some notice of his purpose to raise that particular issue. The death of the plaintiff, after the order of the court, may be considered as settled between the parties for that case, unless some motion is made or issue raised on the part of the defendant by which the fact of the death is controverted.

We have been referred to no decision of the supreme court of Illinois where a different rule has been announced. In the case of *Milliken v. Martin*, 66 Ill. 17, cited by counsel for defendant, the court merely decided that where a party plaintiff had died and his heirs were substituted in his place, they must prove that the person under whom they claimed was seized of the title and that they were his heirs. But the report of the case clearly shows that the point now under consideration was neither decided nor touched. We think, therefore, that the ruling and charge of the court below did not prejudice the defendant.

The next assignment of error relates to the admission in evidence by the court of the certified copy of the deed from Dunbar to Prout, and the testimony offered by the plaintiff to sustain such copy. The deed purported to be a conveyance, with covenants of general warranty, by Dunbar to Prout, of the land in controversy, for the consideration of \$80. It recited that Dunbar was the patentee thereof, and set out the patent in full. The following is a copy of the in testimonium clause of the deed, of the signatures of the grantor and witnesses, the acknowledgment, affidavit of the grantor of his identity, his receipt for the purchase money, memorandum of registration, and certificate of the recorder of deeds for Madison county, Ill.:

"In witness of all the foregoing I have hereunto affixed my hand and seal, at Washington city, in the county of Washington and District of Columbia, this sixth day of January, one thousand eight hundred and eighteen.

John J. Dunbar. [Seal.]

"Signed, sealed, and delivered in the presence of

"Samuel N. Smallwood.

"Joseph Cassin."

"District of Columbia, County of —, ss.:

"Be it remembered that on this sixth day of January, 1818, the above-named John J. Dunbar, who has signed, sealed, and delivered the above instrument of writing, personally came and appeared before us, the undersigned justices of the peace, and acknowledged, in due form of law, the same to be his free act and deed, for the purposes therein set forth, and also gave his consent that the same should be recorded whenever it might be deemed necessary. In witness of all which the said — has hereunto affixed his name and has undersigned the same.

his

"John X J. Dunbar.
mark.

"Acknowledged before

"Samuel N. Smallwood.

"Joseph Cassin."

"I, John J. Dunbar, do declare upon oath that I am the same person intended and named in the above deed, dated the sixth day of January, 1818, and more particularly in the patent therein recited at length, and

further, that I was duly placed in possession of the patent for the land conveyed in the above deed, by receiving the same from the general land-office.

his
"John X J. Dunbarr.
mark.

"Sworn and subscribed to before me this seventh day of January, 1818.

"Samuel N. Smallwood."

"Received, this sixth day of January, 1818, from William Prout, the sum of \$80, being the consideration money expressed in the above deed.

his
"John X J. Dunbarr.
mark.

"Witness: Joseph Cassin.

"Recorded June 23, 1818."

"State of Illinois, Madison County, ss:

"I, John D. Heisel, clerk of the circuit court, and ex officio recorder of deeds within and for Madison county, in the state of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete copy of an instrument of writing or deed of conveyance now appearing of record at my office in book E, pages 154, 155, and 156. In witness whereof I have hereunto set my hand and affixed the seal of our said court, at office in the city of Edwardsville, this third day of February, A. D. one thousand eight hundred and seventy-five.

"[Seal.] John D. Heisel, Clerk."

The defendant below objected to the introduction of said certified copy in evidence, because the original deed was not so certified and proven as to make a certified copy from the record competent evidence, under the laws of Illinois.

The court, without passing at that time upon the objection, and not then admitting said writing in evidence as a certified copy, permitted the plaintiffs, at their request, to make the following proofs:

"And thereupon," as the bill of exceptions states, "the plaintiffs proved, to-wit:

"(1) By Mr. Dent, one of the plaintiffs' counsel, that said counsel had had in their possession, prior to the great fire of October 8 and 9, 1871, in Chicago, an original deed corresponding substantially in contents to the writing offered in evidence, except that there was not attached to it the official certificate, dated February 3, 1875; that he had not compared said offered copy with said original, but he believed from recollection that it corresponded with the original, and that he had not made said alleged copy; that said original deed had been sent to said counsel in behalf of Wm. B. Morris, the then plaintiff, for use in this suit, and had been offered in evidence on the first trial; that said original deed had been burned up in the Chicago fire of October 8 and 9, 1871; further, that said original deed had been sent to Washington, and attached as an exhibit to the

original depositions of E. J. Middleton and George Collard, hereinafter mentioned, and had subsequently been detached therefrom by leave of the court, and returned to Washington for use in taking the depositions of Henrietta Boone.

"(2) The plaintiffs further offered to read in evidence a copy of the original depositions of E. J. Middleton and George Collard, taken de bene esse on September 21, 1870, at Washington, D. C., to which the defendant below objected. It was admitted that the depositions had been correctly copied by an attorney in the cause from the original depositions on file in the case; that the original depositions, with the other files and records of the court, were burned up in the fire at Chicago of October, 1871; that no order of the court had ever been made authorizing the filing of said copy as a substitute for the original depositions, and that no proceedings under any statute had been had for the purpose of restoring said original, but that after said fire the plaintiffs' counsel had procured said copy from the counsel of defendant, and, with his consent, had placed it on file in this cause as a copy of the original depositions.

"The court thereupon overruled each of said objections to the reading of said copy of the depositions, and permitted the contents of said copy to be read in evidence, which was done; to which decision of the court the defendant then and there excepted.

"The contents of said copy so read were as follows: 'That said Middleton and Collard had carefully examined the signatures of Samuel N. Smallwood on said original deed purporting to be his in three different places, and aver the said signatures to be the genuine handwriting of said Samuel N. Smallwood; and that said original deed is annexed to their depositions as Exhibit A; that they were personally acquainted with Samuel N. Smallwood in his life-time, and knew his handwriting, having often seen him write, and they have no hesitation in declaring said signatures to be his genuine signatures.'"

The plaintiffs also offered in evidence the deposition of William W. Corcoran, who testified that in 1847 he purchased the lands in controversy from the United States at public sale and paid the purchase money for them into the treasury of the United States, and that, at the time of the purchase, he had no notice of any adverse claim.

The plaintiffs further read in evidence a certified copy of a commission from President Monroe, attested by Richard Rush, acting secretary of state, and the seal of the United States, dated April 30, 1817, appointing Joseph Cassin, justice of the peace in the county of Washington, in the District of Columbia, until the end of the next session of the United States senate, and no longer; also a certified copy of a like commission,

dated September 1, 1817, appointing Samuel N. Smallwood a justice of the peace of said county until the end of said session, and no longer.

The plaintiffs also offered in evidence the deposition of Anthony Hyde, who testified that he was the business agent in Washington City of W. W. Corcoran; that he knew of the purchase of the land in question by said Corcoran in 1847, and of the payment by him of over \$22,000 into the treasury of the United States for this and other lands; that from February, 1848, up to the time when his testimony was taken, February 24, 1875, he had attended to all matters touching the tract of land in suit, such as the payment of taxes and the appointment of agents, up to the time of the conveyance thereof by Corcoran to William B. Morris; that he sent the original deed from Dunbar to Prout, attached to the depositions of E. J. Middleton and George Collard, to the counsel of plaintiffs below in Chicago, on October 11, 1870; that said deed was afterwards returned to obtain a deposition of one Mrs. H. H. Boone as to Joseph Cassin's signature, and was afterwards forwarded, attached to a deposition of Mrs. Boone, to the clerk of the United States circuit court at Chicago, on or about January 26, 1871.

Hyde further testifies that he had paid the taxes on said lands for Mr. Corcoran from 1847 to 1864, mainly through agents who lived in Illinois, but that he himself had for a year or two paid the taxes directly to the county officers.

Assuming, for the present, that the evidence offered to support the deed from Dunbar to Prout was competent and properly admitted, the question is presented whether the deed itself, thus supported, was admissible. We are of the opinion that it was.

The existence of the original deed and its destruction in the fire at Chicago, in October, 1871, was distinctly proved by the testimony of Dent, counsel for plaintiffs. He testified that it had been sent to the counsel in Chicago of the original plaintiff in the case; that it had been offered in evidence on the first trial of the case, and had been burned with the other papers and records of the court in the fire mentioned. It was therefore competent for the plaintiffs to prove its contents. Thus, in *Riggs v. Taylor*, 4 Wheat. 486, this court said:

"The general rule of evidence is, if a party intend to use a deed or any other instrument in evidence he ought to produce the original if he has it in his possession, or if the original is lost or destroyed secondary evidence, which is the best the nature of the case allows, will, in that case, be admitted. The party, after proving any of these circumstances to account for the absence of the original, may read a counterpart, or if there is no counterpart an examined copy, or if there should not be an examined copy he may give parol evidence of its contents."

In the present case it does not appear that there was in existence any counterpart or examined copy of the destroyed deed. The only resource left to the plaintiffs was to prove the contents of the original by a witness who knew its contents. This was done by the deposition of Dent. He testified that the original deed corresponded substantially in contents to the certified copy offered in evidence, except that there was not attached to it the official certificate of the court, dated February 3, 1875. This evidence made the copy competent for the purposes of the trial.

Having thus established the fact of the original deed and its contents, the plaintiffs below were in the same position as if the original deed was in their possession and they had offered it in evidence. It remained for them to prove its execution.

It has been held by the supreme court of Illinois, that, under the act of February 19, 1819, for establishing a recorder's office, and which was substantially the same as the act of 1807, which was in force when the deed from Dunbar to Prout was executed, a deed is valid as between the parties to it without being acknowledged. *Semple v. Miles*, 2 Scam. 315. See, also, *McConnell v. Reed*, Id. 371.

Having established by proof the fact that the deed had existed and had been destroyed, and that the copy offered in evidence was a copy of the original, it only remained to prove the signing and sealing of the deed by the grantor.

As the witnesses to the deed were shown to be dead, the method pointed out by law to establish the execution of the deed was by proof of the handwriting of the witnesses to the deed. *Clark v. Courtney*, 5 Pet. 319; *Cook v. Woodrow*, 5 Cranch, 13. And when there was more than one witness, proof of the handwriting of one was sufficient. 1 Greenl. Ev. § 575; *Adams v. Kerr*, 1 Bos. & P. 360; 3 Prest. Abst. Tit. 72, 73.

By the depositions of Middleton and Collard, which the court admitted in evidence, the handwriting of Samuel N. Smallwood, one of the subscribing witnesses of the deed, was fully proven. His signature also to the acknowledgment of the deed as one of the justices of the peace before whom the acknowledgment was taken, and his signature to the jurat of an oath of identity indorsed on the deed, subscribed and sworn to before him by Dunbar, were proven by the same testimony. The genuineness of the handwriting of Smallwood as a witness to the deed was placed beyond all doubt by the depositions of these witnesses. If, therefore, the evidence by which this proof was made was competent and admissible, the execution of the deed from Dunbar to Prout was established, and the deed itself was properly admitted in evidence.

We are next to consider the question whether the copies of the depositions of

Middleton and Collard, by which the handwriting of Smallwood was proven, were properly admitted in evidence. This evidence was objected to by the defendant, and his objection was overruled, to which he excepted.

The admission of the parties, as appears by the bill of exceptions, showed the existence of the original depositions; that they had been destroyed with the other records of the court in the fire of October, 1871; that the copies were correct copies of the original depositions, and had been furnished by counsel for defendant, and with his consent had been placed on file in the cause as correct copies of the original. The objection made to the introduction of the copies was that the death of the witnesses was not shown, nor was it proven that they were incompetent to testify, and that their depositions could not be retaken; therefore proof of what they had testified in their depositions was not admissible.

The rule invoked to exclude copies of the depositions is that in the absence of evidence that the witness who testified in a former trial is dead or incapable of testifying, or that his deposition cannot be retaken, it is not competent to show what his testimony in the former trial was; and that when the deposition of a witness which was read upon a former trial is lost, its contents cannot be proved except after proof of the death of the witness whose testimony it contained. *Stout v. Cook*, 47 Ill. 530; *Aulger v. Smith*, 34 Ill. 537.

But if the witnesses had lived in another state, and more than a hundred miles distant from the place of trial, proof of the contents of their deposition would have been admissible. *Burton v. Driggs*, 20 Wall. 125. Therefore, to have made the objection tenable, it should have also been put upon the ground that the witnesses were not shown to reside in another state and more than a hundred miles from the place of trial. This it did not do. When a party excepts to the admission of testimony he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. *Burton v. Driggs*, *ubi supra*. The original depositions were taken in the city of Washington. It is, therefore, probable that the witnesses resided there. If the copy of the depositions had been objected to because it was not shown that the witnesses resided out of the district, and more than a hundred miles from the place where the court was held, the plaintiffs below might have supplied proof of that fact. The objection, as it was made, was not broad enough and specific enough, and was, therefore, properly overruled and the evidence admitted.

But we think the rule relied on by defendant to exclude copies of the deposition does not apply to the case in hand. The plaintiffs did not offer oral evidence of the contents of the depositions, but offered copies

which were admitted by counsel for defendant to be true copies. It was, therefore, not necessary to retake the depositions or to prove the death of the witnesses, or their incapacity to testify. The copy of the deposition was, by consent, substituted for the original, which was proven to have been destroyed, and, being admitted to be a true copy, spoke for itself. It was, therefore, properly received in evidence.

It was further objected to the admission in evidence of the proof relating to the deed of John J. Dunbar to Prout, that as the testimony to establish its execution was the proof of the handwriting of subscribing witnesses, it was necessary to prove the identity of the grantor in the deed; that is to say, that the John J. Dunbar by whom the deed purported to be executed was the same John J. Dunbar named in the patent for the lands in controversy. In any case slight proof of identity is sufficient. *Nelson v. Whittall*, 1 Barn. & Ald. 19; *Warren v. Anderson*, 8 Scott, 384; 1 Selw. N. P. (18th Ed.) 538, note 7. But the proof of identity in this case was ample. In tracing titles identity of names is *prima facie* evidence of identity of persons. *Brown v. Metz*, 33 Ill. 339; *Cates v. Loftus*, 3 A. K. Marsh, 202; *Gitt v. Watson*, 18 Mo. 274; *Balbie v. Donaldson*, 2 Grant (Pa.) 450; *Bogue v. Bigelow*, 29 Vt. 179; *Chamblee v. Tarbox*, 27 Tex. 139. See, also, *Sewell v. Evans*, 4 Adol. & E. 626; *Roden v. Ryde*, Id. 629. There was no evidence that more than one John J. Dunbar lived at the date of the deed in Matthias county, Virginia, which the deed recites was the residence of the grantor, nor in the District of Columbia, where the deed was executed, and there was no other proof to rebut the *prima facie* presumption raised by the identity of names in the patent and deed. But, besides the identity of names, there was other evidence showing the identity of persons. The patent and the deed bore date the same day, and the patent was cited in *hæc verba* in the deed. These circumstances tend strongly to show that the party by whom the deed was executed must have had possession of the patent. The deed recites that the patent was delivered to the grantor, John J. Dunbar, and the affidavit of John J. Dunbar, sworn to and subscribed on January 7, 1818, before Smallwood, a justice of the peace, and one of the subscribing witnesses to the deed, whose signature to the jurat is shown to be genuine, to the effect that he was the same John J. Dunbar to whom the patent was issued, was indorsed upon the deed.

After a lapse of 61 years, this evidence is not only admissible to prove the identity of the grantee in the patent with the grantor in the deed, but, uncontradicted, is conclusive.

We are, therefore, of opinion that the deed from John J. Dunbar to William Prout, which formed a link in the title of the plaintiffs, was sufficiently proven, and was properly admitted in evidence by the circuit

court.) The other muniments of title put in evidence by the plaintiffs were admitted without objection, and established prima facie their title to the lands in controversy. But it will be remembered that the defendant below had also shown a prima facie title to the lands in question; that both parties traced title through the patent of the United States issued to Dunbar, and through deeds apparently executed by him on the same day, to-wit, January 6, 1818,—one to William Prout, under which the plaintiffs claimed, and the other to John Frank, under which the defendant claimed.

The question, therefore, still remains, which is the superior title? According to the jurisprudence of Illinois, this must be settled by the fact, which of the two deeds, apparently executed by Dunbar, was first recorded.

Section 15 of the act approved January 31, 1827 (Purple, Real Est. St. 480), provided as follows:

"All grants, bargains, sales, etc., of or concerning any lands, whether executed within or without the state, shall be recorded in the recorder's office in the county where such lands are lying, and being within 12 months after the execution of such writings, and every such writing that shall, at any time after the publication hereof, remain more than 12 months after the making of such writing, and shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent bona fide purchaser or mortgagee for valuable consideration, unless such deed, conveyance, or other writing be recorded as aforesaid, before the proving and recording of the deed, mortgage, or other writing under which any subsequent purchaser or mortgagee shall claim."

This act remains substantially in force. Hurd, Rev. St. p. 271, § 30.

By an act, approved July 21, 1837 (Purple, Real Est. St. 496, 497), it was provided that the recording of any deed, * * * whether executed within or without the state, by the recorder of the county in which the lands intended to be affected are situated, shall be deemed and taken to be notice to subsequent purchasers and creditors from the date of such recording, whether said writings shall have been acknowledged or proven in conformity with the laws of the state or not, and that the provisions of the act shall apply as well to writings heretofore as those hereafter admitted to record. This law is still in force. See Hurd, Rev. St. 1880, p. 271, § 31.

It was held by the supreme court of Illinois, in *Reed v. Kemp*, 16 Ill. 445, that an instrument affecting or relating to real estate may be recorded, though not proven or acknowledged, and the record will operate as constructive notice to subsequent purchasers and creditors. See, also, *Choteau v. Jones*, 11 Ill. 320; *Martin v. Dryden*, 1 Gilman, 213. And in *Cabene v. Breckenridge*, 48 Ill. 94, the court declared that, "as a general rule,

when the same person has executed two deeds for the same land, the first deed recorded will hold the title."

The evidence shows that the deed of Dunbar to Frank, under which the defendant claimed title, was not recorded until June 18, 1870. The plaintiffs contended that the deed from Dunbar to Prout, under which they claimed, was recorded on June 23, 1818, and it was shown that the deed from Prout to Duncan was recorded October 29, 1838, and the deed of Gillett to Corcoran, June 5, 1848, and the deed of Corcoran to Morris, March 12, 1868. If, therefore, the contention of the plaintiffs that the deed of Dunbar to Prout was recorded June 23, 1818, is sustained by competent proof, their title must prevail.

But it is insisted for defendant that there was no competent proof of the registration of the deed of Dunbar to Prout. The proof relied on was the testimony of Dent, that the certified copy from the records of the county of Madison was a copy of the original deed; the certificate of the recorder that the certified copy was a copy of a deed which appeared of record in his office; and the certified copy of a memorandum at the foot of the record of the deed as follows: "Recorded June 23, 1818." Conceding that the certified copy of the deed from the records of Madison county would not be proof of the contents of the original deed, because such original deed had not been so acknowledged and certified as to make a certified copy competent evidence, yet the fact that such a record of the deed existed, was, by the law of Illinois, as we have seen, notice to subsequent purchasers. A certified copy from the record was, therefore, a proof that such a deed and memorandum were of record in the proper office. For it is a settled rule of evidence that every document of a public nature which there would be an inconvenience in removing, and which the party has the right to inspect, may be proved by a duly-authenticated copy. *Saxton v. Nimms*, 14 Mass. 320; *Thayer v. Stearns*, 1 Pick. 109; *Dunning v. Roome*, 6 Wend. 651; *Dudley v. Grayson*, 6 T. B. Mon. 259; *Bishop v. Cone*, 3 N. H. 513; 1 Greenl. Ev. § 484.

The memorandum at the foot of the record was the usual record evidence, competent and conclusive, that the deed had been recorded at the date mentioned. It was evidence of the date of the registration of the deed, because it was the duty of the recorder, by the nature of his office and without special statutory direction, to note when the record was made. 1 Greenl. Ev. § 483. But we think it may be fairly inferred from section 10 of the act of September 17, 1807, which was in force when it is claimed that the deed from Dunbar to Prout was recorded, that it was the duty of the recorder to note the time when deeds left with him for record were recorded. He was specifically required to note the date when the deed was received, and was liable to a penalty of \$300

for recording any deed in writing "before another first brought into his office to be recorded." 1 Adams & D. Real Est. St. 63. The making of a memorandum of the date of record was, therefore, an official act, which naturally fell within the line of his statutory duties, and a certified copy of it would be competent evidence to prove the memorandum and the date of the registration of the deed.

We are of opinion, therefore, that the fact that the deed of Dunbar to Prout was recorded on June 23, 1818, was proved by competent evidence, and that it therefore follows that the title of the plaintiffs was better and superior to that of defendants, who claimed under a deed for the same lands not recorded until June 18, 1870, more than 50 years after its date, and long after innocent purchasers had bought the lands and paid a valuable consideration for them.

The plaintiff in error contends that the act

of 1837, supra, cannot apply in this case, because at its date the lands in question were no longer within the limits of Madison county, but in the county of Putnam. But the act expressly declares that it shall apply to writings theretofore as well as those thereafter admitted to record. The deed of Dunbar to Prout was recorded under the act of 1807, supra, which required it to be recorded in the county where the lands conveyed were situated. It was so recorded. No law of Illinois since passed has required any other registration of deeds by the parties thereto, or has changed the effect of the original registration. See act of February 27, 1841; 1 Adams & D. Real Est. St. 93, 94.

The view we have taken of the case renders it unnecessary to notice certain questions of local practice argued by counsel.

We find no error in the record of the circuit court. Its judgment must therefore be affirmed.

GARRETT v. HANSHUE et ux.

(42 N. E. 256.)

Supreme Court of Ohio. Nov. 26, 1895.

Error to circuit court, Richland county.

Action by W. H. Garrett against W. S. Hanshue and another. Defendants had judgment, which was affirmed by the circuit court, and plaintiff brings error. Reversed.

The action in the common pleas was brought by W. H. Garrett, plaintiff, against W. S. Hanshue and Barbara Hanshue, his wife, defendants, to recover damages for breach of covenants of title to certain lands in Iowa, conveyed by them to one Mattie Shephard by deed of general warranty, and by her conveyed to the plaintiff by like deed. By written assignment on the back of her deed to plaintiff, Mattie Shephard assigned and transferred to him her right of action against Hanshue and wife for breach of warranty as to the title of the Iowa lands, and this assignment was set out in the petition. The defendants, among other things, denied the conveyance from Mattie Shephard to plaintiff, and also denied the assignment of the cause of action, and failure of title to the Iowa lands. Plaintiff had an abstract of the title of the lands in question, and, for the purposes of the trial, the attorneys of record of said defendants placed upon said abstract the following written agreement: "It is hereby agreed that the within abstract shows the true condition of the title of the lands therein abstracted. Cummings & McBride." Upon the trial of the case to a jury, the plaintiff, having proved by Mattie Shephard, the grantor in the deed to plaintiff, that she executed and delivered said deed to him, offered to introduce said deed in evidence, to which defendants, by their counsel, objected, upon the ground that, before the deed could be received in evidence, its execution should be proved by at least one of the subscribing witnesses, unless it should appear that the evidence of such witness could not be procured. The court sustained the objection, and plaintiff excepted, and the deed was ruled out. Plaintiff also offered to introduce said abstract in evidence to show the state of the title to said lands, and to prove that defendants had no title to the lands at the time of their conveyance to Mattie Shephard. Defendants, by their counsel, objected to the introduction of said abstract as evidence upon the ground that, aside from the said agreement of counsel, it was incompetent, and that such agreement did not make it competent when objected to on the trial. The court sustained the objection, to which plaintiff excepted. The court instructed the jury to return a verdict for defendants, which was done. A motion for a new trial was filed, assigning, among other things, the ruling out of said deed and abstract by the court. Said motion was overruled, and judgment entered on the verdict, to all of which plaintiff excepted. The circuit court affirmed the judgment of the com-

mon pleas, and thereupon plaintiff filed his petition in this court to reverse both judgments below.

S. C. Parker and D. Dirlam, for plaintiff in error. Cummings & McBride and Lewis Brucker, for defendants in error.

BURKET, J. (after stating the facts). As far back as we have been able to trace the matter, both in England and this country, it has been uniformly held that the execution of a deed or other written instrument having one or more attesting witnesses must, as to rights between the parties or their privies, be established by the testimony of at least one of the subscribing witnesses, and that other proof of execution is incompetent, unless it be first shown that the evidence of such witness cannot be had. Starkie, in his work on Evidence (page 320), states the rules as follows: "If the deed or instrument produced purports to have been attested by one or more witnesses, whose names are subscribed, the party must call at least one of the witnesses; and, in cases where the instrument labors under any doubt or suspicion, he ought to call them all. The law requires the testimony of the subscribing witness, because the parties themselves, by selecting him as the witness, have mutually agreed to rest upon his testimony in proof of the execution of the instrument, and of the circumstances which then took place, and because he knows those facts which are probably unknown to others. So rigid is this rule that it is not superseded, in the case of a deed, by proof of any admission or acknowledgment of the execution by the party himself, whether the action be brought against the obligor himself, or against his assignees after his bankruptcy; nor by proof of an admission of the execution, made by the defendant in his answer to a bill in equity. The rule applies, whether the question be between the parties to the deed or strangers, whether the deed be the foundation of the action or but collateral, or whether it still exist as a deed or has been canceled, and although the issue be directed by a court of equity to try the date, and not the existence of a deed. Upon an indictment against an apprentice for a fraudulent enlistment, it was held that the indentures must be proved in the regular way. And the same rule applies to all written agreements and other instruments attested by a witness; as, for instance, a notice to quit in ejectment, in which case it was held that proof of service of the notice upon the tenant, and that it was read over to him without his making any objection, was not sufficient." Greenleaf, in his work on Evidence (section 569), states the rule as follows: "The instrument, being thus produced and freed from suspicion, must be proved by the subscribing witnesses, if there be any, or at least by one of them. Various reasons have been assigned for this rule, but that upon which it seems best founded is that a fact may be known to the subscribing witness, not within the knowledge or recollection of the

obligor, and that he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction. The party to whose execution he is a witness is considered as invoking him, as the person to whom he refers, to prove what passed at the time of attestation." Wharton, in his work on Evidence (section 723), states the rule as follows: "By the strict rule of the English common law, when there are subscribing witnesses to an instrument, such witnesses should be called to prove its execution, or their absence should be duly accounted for. The statutes allowing parties to be witnesses do not of themselves abrogate this rule." This rule was recognized and followed by this court in *Zerby v. Wilson*, 3 Ohio, 43, and also in *Warner v. Railroad Co.*, 31 Ohio St. 260, and the same rule is found in *Swan*, Just. p. 154.

It is said that this rule is founded upon the reason that a fact may be known to the subscribing witness not within the knowledge or recollection of the obligor, and that he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction. This is the reason given by *Le Blanc, J.*, in *Call v. Dunning*, 4 East, 54, and followed by many judges since without question or investigation as to its soundness. That this reason is unsound is clear from the consideration that the competency of evidence does not depend upon the fact of either knowledge or recollection of a particular witness. Where two witnesses have equal means of knowledge of a particular fact, both are equally competent as witnesses, although one may have imperfectly comprehended the fact, and but faintly recollects the transaction, while the other may be clear as to the fact, and perfect in his recollection. The want of comprehension and recollection will go as to the weight, but not as to the competency, of the evidence. Another reason given for the rule is because the parties themselves, by selecting the witnesses, have mutually agreed to rest upon their testimony in proof of the execution of the instrument, and of the circumstances which then took place, and because they know those facts which are probably unknown to others. This supposed mutual agreement is a pure fiction, and rarely, if ever, exists in fact. If in any case it has a real existence, and can be shown, it may perhaps be enforced; but the mere fiction is entitled to no weight and to no respect. The fact that such witness may know facts which are unknown to others does not go to the competency of the evidence of another witness as to facts actually within his knowledge. It is also said that the party to whose execution he is a witness is considered as invoking him, as the person to whom he refers to prove what passed at the time of attestation. This is also a pure fiction, but may have been well enough when parties were debarred from testifying. The execution of written instruments does not involve a sacred ceremony, but a business transaction, and should, like any other

fact, be proven by the best evidence of which it is capable; that is, by evidence which does not presuppose the existence of other evidence of a higher character. As this rule had its origin when parties to actions were not permitted to testify, when deeds were not required to be acknowledged before an officer, and when the execution of such instruments was attempted to be proven by the admissions of the grantors, there was some reason for holding that the direct evidence of the subscribing witnesses was better and of a higher character than the admissions of the grantor, whether made orally or in a written answer in chancery. The oral admissions were evidence only upon the presumption that a man would not admit that which was against his interest; but often the establishment of the instrument was for his interest, and then, of course, he should not be permitted to prove it by his admission. The same was true of an admission in an answer in chancery, with this additional objection: that he should not be permitted to prove a fact by an admission in his answer in chancery which he could not be allowed to prove by his evidence in court. He could not by his answer do indirectly that which he could not do directly by his sworn evidence upon the trial. But as parties to actions can now testify, and deeds are required to be acknowledged before an officer, this reason of the rule has ceased. True, in *Hodnett v. Smith*, 2 Sweeney, 401, 10 Abb. Prac. (N. S.) 86, and 41 How. Prac. 190, it was held that the statutes allowing parties to be witnesses do not of themselves abrogate this rule. That decision was by the superior court of the city of New York, and the cases there cited and relied upon are decisions of the courts of common pleas of the state of New York, and those courts followed the old rule without question. Not being by a court of last resort, the case is not of controlling weight here. The question was not examined on principle, and, if it had been, a different conclusion should have been reached. While a statute making a party to an action a competent witness does not of itself make that part of his evidence competent which was before incompetent, yet if the evidence was in its nature competent before the statute, and was made unavailable by reason of the incompetency of the witness, when such incompetency is removed by statute, the evidence thereby becomes available, and may be introduced through such newly-enfranchised witness. As to the execution of an instrument, it was said that the subscribing witnesses should be first called, because they not only saw, but participated in, the transaction, and had their attention thereby specially called to the subject, while mere bystanders, with equal opportunity to see and hear, would not so fully understand the matter as those who actually took part in the transaction; and although the grantor saw the transaction, and participated therein, and was in fact the prin-

principal actor, and had full information, yet, as he was an incompetent witness, it was held that the testimony of the subscribing witnesses was the best evidence of the fact of execution. On principle, it was not the evidence of the grantor that was incompetent, but it was the witness that was incompetent. By removing the incompetency of the witness, his evidence, which in its nature was always competent, became available to prove the fact of execution, and his evidence in such case is as good and of as high a character as that of the subscribing witnesses. True, he may be interested, but that goes only to the weight, and not to the character or competency, of the evidence. By section 310 of the Code, adopted in 1853, parties to actions became competent witnesses, but it was provided that their interest might be shown to affect their credibility. Later the credibility part of the section was removed, and ever since that parties to actions are competent witnesses upon an equality with other witnesses, the credibility of all alike to be determined by the jury in view of all the circumstances. As the evidence of those who were present and participated in the execution of the instrument was regarded as the best evidence of its execution, and the incompetency of the grantor as a witness being now removed by statute, it inevitably follows that he is now, equally with the subscribing witnesses, competent to establish the execution of the instrument.

The rule requiring the execution of a deed to be proven by the subscribing witness would exclude the officer before whom the deed was acknowledged, when we all know that such officer sees and knows all that the witnesses do, and most likely much more. The witnesses are usually hurriedly called in, and give but slight attention to the matter, while the officer usually prepares the deed and acknowledgment, shows the parties where to affix their signatures, sees them sign the deed, and hears them acknowledge it; and a rule which requires such officer, and the party who signed the instrument, to stand aside until the testimony of the subscribing witness is first taken as to its execution, cannot be sound in this day, when all persons are equally competent to testify to any fact within their knowledge, unless otherwise provided by statute, as in the case of wills. In *Warner v. Railroad Co.*, 31 Ohio St. 269, the grantor being dead at the time of the trial, it was proposed to establish the execution of the instrument by proving his signature, and his admission that he had executed the instrument, without first calling the subscribing witnesses or accounting for their absence. This the court held could not be done. The testimony of the subscribing witnesses, who saw the party sign his name to the instrument, was better evidence and of a higher character than the testimony as to his handwriting or admissions. The case was therefore cor-

rectly decided, and the rule as to the subscribing witness was not necessary to sustain the decision. While the rule as to the testimony of the subscribing witnesses was in full force in this state, this court held, in the case of *Simmons v. State*, 7 Ohio, 116, that the rule did not apply in a prosecution for forgery wherein the signer of the forged instrument was a competent witness. Wood, J., used the following language: "In a case arising between the parties to such an instrument having a subscribing witness, and where the obligor, being interested, is excluded from testifying, the rule is a good one which requires such witness to prove its execution. * * * When the obligor is competent, he must be the best witness of which the case will admit, and the subscribing witness, in such case, need not be called." As early as the case of *Grey v. Smithyes*, 4 Burrows, 2273, it was held that the rule did not apply to third persons in a collateral proceeding having no privity with the grantor in the deed. The same was afterwards held in *Ayers v. Hewitt*, 19 Me. 286. There are some other exceptions to the rule, as is shown by the notes to section 569 of *Greenleaf on Evidence*. In Maryland the rule was regarded so narrow that it was changed by statute as early as 1825. We think that the statutes requiring deeds to be acknowledged before an officer, and permitting parties to testify, have so enlarged the rules as to the manner of proving the execution of a written instrument having subscribing witnesses as to abrogate the old rule, and to permit such execution to be proven alike by the grantor, the subscribing witnesses, or the officer before whom the acknowledgment was taken.

Whether or not the court erred in not permitting the abstract to be received in evidence depends upon the question as to whether the attorney of record has power to bind his client by agreement in writing before the trial, as to a matter of evidence, to facilitate the preparation for trial, or to save expense or shorten the trial, and whether what was written on the abstract made it competent evidence on the trial. Rev. St. § 5288, provides that either party may exhibit to the other or to his attorney, at any time before the trial, any paper or document material to the action, and request an admission in writing of its genuineness; and, if the adverse party or his attorney fail to give the admission, such party shall pay the cost of proving the genuineness of such paper or document. This section clearly recognizes the authority of the attorney to bind his client in such cases. In practice, it is a daily occurrence for attorneys to enter into written stipulations as to matters of evidence, and the uniform current of authorities, both in England and this country, is in favor of the power so to do. In 1 Am. & Eng. Enc. Law, p. 954, we find the following: "An attorney at law has authority, by

virtue of his employment as such, to do on behalf of his client all acts, in or out of court, necessary or incidental to the prosecution or management of the suit, and which affect the remedy only, and not the cause of action. This includes the right to demand and receive payment in money of the client's debts; and part payments are within his power to receive as well as payments in full. As long as he appears as attorney on record, bona fide payments to him discharge the debt, no matter what private instructions he may have received from his client. He may also sue out an alias execution. He may receive livery of seisin of land taken under an extent; may waive objections to evidence, and enter into stipulations for the admission of facts or conduct of the trial, and for release of bail; may waive notices, and give extensions of time to file papers, and confess judgment; and may open a default which he has taken (whether improperly or not), and vacate the judgment entirely, even though (it has been held) his client has instructed him to the contrary." The authorities cited in support of the power here in question fully sustain the text. Among others, the following are cited: *Lacoste v. Robert*, 11 La. Ann. 33; *Steph. Dig. Ev. 46*; *Moulton v. Bowker*, 115 Mass. 36; *Lewis v. Sumner*, 13 Metc. (Mass.) 269; *Elton v. Larkins*, 1 Moody & R. 196; *Young v. Wright*, 1 Camp. 139. In *Ish v. Crane*, 13 Ohio St. 574, the case was submitted to the district court upon an agreed statement of facts, signed by the attorneys of record, and the case was reserved to this court; and after such reservation, and before the hearing, counsel for defendant in error attempted to revoke, withdraw, and annul the agreed statement of facts, to which the attorney for plaintiff in error objected. This court refused to permit the withdrawal of the agreed statement, and, in deciding the point, used the following language: "It has long been the practice in this state, as well as in the courts of other states, for counsel to mutually agree upon a state of facts, and to reduce the agreement to writing, and file it in the case, instead of being to the trouble and expense of taking proof by depositions, or otherwise, to show the facts. And when such agreement is reduced to writing, and signed by the parties or their counsel, and filed in the case, I think the general understanding, both of the bar and court, has been that the same was to be regarded, until set aside by the court, as a special verdict of a jury, expressing the result of the proof made by both parties, and so belonging to both parties that neither party could withdraw the same. It is not doubted that, in case of an agreed statement having been so made and filed by mistake, or misappre-

hension of the existing state of facts by one of the parties, he might, consistently with fair practice, upon notice to the adverse party or his counsel, apply to the court for leave, on the ground of such mistake or misapprehension, to withdraw from the files such agreed statement, or such part thereof as was, in fact, untrue, and had been so assented to by mistake or misapprehension; and upon the merits of such motion being sustained by proof, satisfactory to the court, it is not doubted the court might grant such relief as the party should show himself justly entitled to." In view of these authorities, we are of opinion, and so hold, that an attorney of record has ample power to do on behalf of his client all acts, in or out of court, necessary or incidental to the prosecution, management, or defense of the action, and which affect only the remedy, and not the right, and that this includes the power to waive objections to evidence, and enter into stipulations for the admission of facts on the trial. In case the court should, on motion, allow such agreed statement to be withdrawn, ample time should be given for the preparation of the case on other testimony, so as not to take either party by surprise. The spirit is the same as that of section 5286, Rev. St., which requires exceptions to depositions to be heard and disposed of before the commencement of the trial.

The abstract which was ruled out is found in the bill of exceptions, and seems to sustain the contention of the plaintiff. It was therefore material, and, if the agreement was sufficient, it should have been received in evidence. The agreement states that the abstract shows the true condition of the title of the lands therein described, and it appears that the lands therein described are the lands in question; but the agreement fails to state that the abstract may be used as evidence on the trial. But this was not necessary. Whatever is true may, if relevant, be received in evidence. The truth of the abstract being admitted, plaintiff had a right to use it as evidence, without the further agreement of defendant that he might do so.

It follows that the court of common pleas erred in ruling out the deed and abstract, and in overruling the motion for a new trial, and that the circuit court erred in affirming the judgment of the common pleas. Both judgments are therefore reversed, and the cause remanded to the court of common pleas for a new trial. Reversed and remanded.

SPEAR, J., dissents, on the ground that the facts do not warrant the judgment of reversal on the second ground.

APPLEGATE et al. v. LEXINGTON & CARTER COUNTIES MIN. CO. et al.

(6 Sup. Ct. 742, 117 U. S. 255.)

Supreme Court of the United States. March 15, 1886.

In error to the circuit court of the United States for the district of Kentucky.

The suit was in the nature of an action of ejectment to recover possession of a tract of land formerly in Mason county, but now in Greenup, Carter and Boyd counties, in Kentucky. The plaintiffs in error were the plaintiffs in the circuit court. They alleged in their petition that they were the lineal heirs of Carey L. Clark, who died seized of a tract of 8,334 acres, part of a tract of 18,000 acres granted by patent from the commonwealth of Virginia, dated April 21, 1792, to Charles Fleming, from whom their ancestor, Carey L. Clark, derived title by a regular chain of conveyances; that the plaintiffs were the owners and entitled to the possession of the land sued for; and that the defendants had unlawfully entered upon and unlawfully withheld possession of the same. The defendants, by their answers, denied these allegations, and averred that they were seized of the premises by paramount title. The answers were traversed by the plaintiffs' reply.

There was a jury trial. The plaintiffs, to sustain the issue on their part, offered in evidence the following documents as links in their chain of title: (1) A copy, duly certified, from the land-office of the state of Kentucky, of the patent from the state of Virginia to Charles Fleming, for the tract of land of which the land in controversy was originally a part. (2) A copy of the will of Charles Fleming, devising a moiety of said tract of land to William Fleming, John Bernard, Jr., and Richard Bernard, as trustees. (3) A copy of a deed from Samuel Sackett and wife to Joseph Conkling and others, dated August 29, 1795, for the particular land in controversy in this case, together with certain other tracts that had been patented by the state of Virginia to Charles Fleming. (4) A copy of a mortgage from Joseph Conkling and others, the grantees above named, to Samuel Sackett, the grantor above named, conveying the same lands as above, and dated August 29, 1795. (5) A copy of a deed from William Fleming and the Bernards, trustees as above under the will of Charles Fleming, to John Bryan, conveying to Bryan the lands devised to them by the will of Fleming, and dated December 31, 1796. (6) The original of the deed last named. (7) A copy of a deed from John Bryan and wife to Samuel Sackett, dated January 28, 1797, conveying the same land conveyed to Bryan by deed last above named. (8) The original of the deed last above named. (9) The original of a deed from Charles Fleming, dated August 8, 1784, to John and William Bryan,

conveying to them 13,300 acres of the land that had been patented to said Charles Fleming, and being part of the 18,000 acre tract, of which tract the land in controversy is also a part. (10) A certified copy from the Mason county circuit court of the record in the case of Carey L. Clark v. Joseph Conkling and others, in which Clark, as the assignee of the above-mentioned mortgage of Joseph Conkling and others to Samuel Sackett, brought suit to foreclose the same.

The court admitted in evidence the first four of the documents above mentioned. All the others were rejected, namely, the original and a copy of the deed from William Fleming and the Bernards to John Bryan, the original and the copy of the deed from Bryan to Sackett, the original of the deed from Charles Fleming to John and William Bryan, and the copy of the record from the Mason county circuit court in the case of Clark v. Conkling and others. The court having excluded these documents, the plaintiffs were unable to trace title to themselves for the premises in controversy. Thereupon the jury, under the instruction of the court, returned a verdict for the defendants, upon which the court rendered judgment, and the plaintiffs sued out this writ of error.

Mr. Justice WOODS, after stating the facts in the foregoing language, delivered the opinion of the court.

We shall first consider the exclusion of the original deed from Fleming and the Bernards to John Bryan, and the original deed from John Bryan to Samuel Sackett. We are of opinion that they should have been admitted in evidence. They have been certified to and inspected by this court. Their appearance affords strong evidence of their genuineness and antiquity, and they are free from any badge that would excite suspicion of fraud or forgery. In support of their genuineness it was shown that a short time before the trial in the circuit court they were discovered by one of the plaintiffs' attorneys in the office of the clerk of the circuit court of Greenup county, Kentucky, among the original papers of a suit in that court brought by one James Hughes v. Heirs of Thomas Shore, on July 15, 1816, to quiet his title to 16,000 acres of land in Greenup county, part of the lands conveyed by the deed of William Fleming and the Bernards to John Bryan. The deeds and the original papers in that suit were produced by a clerk of the Greenup circuit court in obedience to a subpoena duces tecum. The record of this case was admissible against persons, not parties or privies, to prove the collateral fact of the antiquity of the original deeds offered in evidence and to account for their custody. *Barr v. Gratz*, 4 Wheat. 220. The bill of Hughes averred that he derived title under the patent to Charles Fleming, and by virtue of the devise in his will to William Fleming and the Bernards, and the deeds of William Fleming

and the Bernards to John Bryan and of John Bryan to Samuel Sackett. The complainant Hughes offered by his bill "to produce said patent and deeds showing the deduction of title in proper time, or whenever the court should require it." The two deeds mentioned in the bill of complaint filed by Hughes correspond with and appear to be the two original deeds, namely, the deed from William Fleming and the Bernards to John Bryan, and the deed from John Bryan to Samuel Sackett, offered in evidence by the plaintiffs in this case, which were found among the other papers in the case of *Hughes v. Heirs of Shore*. These deeds were necessary exhibits and evidence in the case to entitle Hughes to the relief prayed for. They were produced from the files of the highest court of the county where the lands were situate, from the custody of an officer charged by law with their care and safe-keeping, where they had been placed for a necessary and proper use, and from which they could not be withdrawn without the order and consent of the court. Their custody was therefore accounted for, and was shown to be proper and beyond suspicion.

It further appeared that upon the trial of the case of *Hughes v. Shore's Heirs*, on July 8, 1825, the patent to Charles Fleming from the commonwealth of Virginia for 16,191 acres of land, the will of Charles Fleming, and the said deed of William Fleming and the Bernards, trustees, to John Bryan, were offered in evidence. The latter was rejected, "because," as the bill of exceptions states, "the certificate and seal of the mayor of Philadelphia" was "not sufficient to authorize it to be read, and because the same could not be read as a recorded deed, not having been recorded within the time prescribed by law;" and "because, by rejecting this deed, complainants' chain of title was broken, and they could not further progress with their evidence, the court rendered a decree dismissing their bill." It is therefore made clear by the evidence offered that at least as early as the year 1825 the deed of William Fleming and the Bernards to John Bryan was on file in the circuit court of Greenup county, and it may be safely inferred that the other documents mentioned by Hughes as his muniments of title were also on file in the same court at the same time, and that all the deeds remained in the custody of the court down to the time when they were produced by the clerk under the subpoena duces tecum issued in this case, a period of 55 years.

Another circumstance relied on to show the genuineness of the original deeds was that each bore, indorsed thereon, a certificate apparently ancient and genuine, one with the signature of the recording officer, and the other without signature, to the effect that the deeds had been recorded in the year 1816. In the case of *Stebbins v. Duncan*, 108 U. S. 50, S. C. 2 Sup. Ct. 313, it was held that a cer-

tified copy of a memorandum made at the foot of the record of a deed "recorded June 23, 1818," and without signature, was competent and conclusive evidence that the deed had been recorded at the date mentioned. In view, therefore, of the habit of recorders of deeds, which is universal, and matter of common knowledge, to indorse upon the deeds themselves the fact and date of their registration, the certificates appearing on the deeds in question were competent and sufficient evidence of the fact that the deeds had been put upon record during the year mentioned in the certificates. We think this evidence, supported by an inspection of the deeds, was sufficient to justify their admission as ancient deeds, without direct proof of their execution. The rule is that an ancient deed may be admitted in evidence, without direct proof of its execution, if it appears to be of the age of at least 30 years, when it is found in proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity freeing it from all just grounds of suspicion.

Thus, in *Barr v. Gratz*, 4 Wheat. 220, a deed from Craig to Michael Gratz, dated July 16, 1784, was offered in evidence, but was not proved by the subscribing witnesses, nor their absence accounted for. Its admission was alleged as error; but this court said that, as the deed was more than 30 years old, and was proved to have been in the possession of the lessors of the plaintiff, and actually asserted by them as the ground of their title in a prior chancery suit, it was, in the language of the books, sufficiently accounted for, and on this ground, as well as because it was a part of the evidence in support of the decree in that suit, it was admissible without the regular proof of its execution. So, in *Caruthers v. Eldridge*, 12 Grat. 670, it was contended by the plaintiff in error that in no case could a paper be admitted in evidence as an ancient deed, without proof of its execution, until it was first shown that 30 years' quiet and continued possession of the land had been held under the deed. But the court held, in substance, that an ancient deed may be introduced in evidence without proof of its execution, though possession may not have been held for 30 years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and as will afford the presumption that it is genuine. In *Harlan v. Howard*, 79 Ky. 373, the court of appeals states the rule in relation to the proof of ancient deeds thus: "The genuineness of such instruments may be shown by other facts as well as that of possession; and when proof of possession cannot be had, it is within the very essence of the rule to admit the instrument, when no evidence justifying suspicion of its genuineness is shown, and it is found in the custody of those legally entitled to it." See, also, *Vin. Abr. "Evidence," A, B, 5, "Ancient Deeds," 7; Com. Dig. "Evi-*

dence," B, 2; 1 Greenl. Ev. § 144, and note 1; Starkie, Ev. 524; Phil. Ev. (Cow. & H. Notes, 3d Ed.) pt. 2, note 197, p. 368 et seq.; Doe v. Passingham, 13 E. C. L. 309; In re Parkyn's Will, 6 Dow, 202; Winn v. Patterson, 9 Pet. 663; Jackson v. Laroway, 3 Johns. Cas. 283; Hewlett v. Cock, 7 Wend. 371. In the case last cited, Judge Nelson, afterwards a justice of this court, said that there was some confusion in the cases in England and New York as to the preliminary proof necessary to authorize an ancient deed to be read in evidence; that possession accompanying the deed was always sufficient without other proof, but it was not indispensable. He approved the decision in Jackson v. Laroway, *ubi supra*, which he said had been recognized as law in Jackson v. Luquere, 5 Cow. 221, and had undoubtedly in its favor the weight of English authority. These authorities sustain the rule as we have stated it.

The deeds in question, when offered in evidence, purported to be over 80 years old, and their appearance tended to prove their antiquity and their genuineness. The testimony offered in support of them proved their existence as far back as the year 1816, and that in that year they had been placed upon the public record of deeds, where, if properly acknowledged, they would have been entitled to registration. In the same year in which they were recorded they were mentioned and referred to in the bill filed by Hughes v. Shore's Heirs as muniments of his title, and he offered to produce them when required. There is no reason to doubt that they remained in the rightful custody of the clerk in whose office they had become file papers, until, after a lapse of at least 55 years, they were found, and produced upon the trial of the present case by the officer to whose custody they belonged.

But the proof of the genuineness of both deeds was greatly strengthened by evidence which applied directly to one only of the two, namely, the original deed from John Bryan to Samuel Sackett, dated January 28, 1797. This consisted of the record of a partition made October 18, 1810, on the application of James Hughes, by commissioners, under authority of a general act of the legislature of Kentucky approved December 19, 1796, Hughes claimed the undivided half of the 18,000 acres conveyed to Charles Fleming by the governor of Virginia, by patent dated April 21, 1792; and alleged as muniments of his title the said patent, and the deed of John Bryan to Samuel Sackett. On the strength of the title shown by Hughes the commissioners divided the 18,000 acres, and set off and conveyed to him the one-half thereof in severalty, and, in their deed of conveyance, referred to the patent to Charles Fleming, and the deed of Bryan to Sackett, as links in the title of Hughes. The partition thus made is shown to have been recognized by successive conveyances of parts of the land set off to Hughes, and by possession held thereunder.

The testimony therefore shows that as early as the year 1810 the deed of Bryan to Sackett was in existence; that it was recognized as a genuine deed by public officers whose duty it was to scrutinize it, and was made by them the basis of their official action; and that possession has been held of a portion of the land described therein by persons who trace title through it to the patent to Charles Fleming. These two deeds under consideration are shown by the record to have a common history, and to have been relied on as links in the same chain of title. Testimony, therefore, which is directly applicable to one only tends to support the other. The facts, therefore, which we have just stated in reference to the deed from Bryan to Sackett tend to show also the genuineness of the deed from Fleming and the Bernards to Bryan. We are therefore of opinion that the genuineness of both deeds was proven, and that the court erred in excluding them from the jury.

The offer in evidence of the original deed from Charles Fleming to John and William Bryan, dated August 8, 1794, stands upon substantially the same ground as the two deeds already considered. The bill of exceptions states that the plaintiffs offered in support of the competency of this deed the same evidence as was offered in support of the two last-mentioned deeds; that it was found at the same time and place, and produced from the same custody. In further support thereof the plaintiffs produced the clerk of the Mason county court, having with him Deed Book B, containing deeds recorded in the clerk's office of that court, beginning February 22, 1794, and the two or three years next ensuing, and offered to show that there was recorded in that book a deed identical in terms with the aforesaid original deed. They also offered and read in evidence a copy of the deed, duly certified from the clerk's office of the Mason county circuit court, with a copy of the certificate thereto appended showing that the original deed was recorded in the year 1794. It follows, from what we have said in relation to the admissibility of the other original deeds, that this one, also, should have been received in evidence, and that the circuit court erred in excluding it.

It remains to consider the exclusion by the circuit court of the transcript of the record in the case of Clark v. Conkling. This was a suit brought by Clark in the district court held at Washington, in Mason county, Kentucky, on June 13, 1798, as the assignee of the mortgage from Conkling to Sackett, to foreclose the same, and the record was offered only to show the orders and decrees of the court in respect to the mortgaged premises situated within its jurisdiction, and not to prove any personal decree against the defendants. It appears from the record in this case that a subpoena having been issued and returned, with the indorsement that the defendants were not inhabitants of the commonwealth, the court made the

following order at its November term, 1798: "The defendants, not having entered their appearance agreeably to an act of assembly and rules of this court, and it appearing to the satisfaction of the court that they are not inhabitants of this commonwealth, on the motion of the complainant, by his attorney, it is ordered that the defendants appear here on the third day of our next term, and answer the complainants' bill; and that a copy of this order be inserted in the Kentucky Gazette or Herald for two months, successively, another posted at the door of the court-house of Mason county; and that this order be published some Sunday at the door of the Baptist meeting-house in Washington." In June, 1799, the bill was taken as confessed, and an interlocutory decree made requiring the defendants to pay the money due on the mortgage. The money not having been paid, a decree of sale was made at the February term, 1800. The commissioners to make the sale reported on July 19, 1802, that after public notice they had sold the lands at public sale to Carey L. Clark, the complainant. Afterwards a final decree was made, foreclosing the defendants of their equity of redemption in the premises.

The defendants objected to the introduction of the record, and the objection was sustained, and the defendants now insist that the exclusion of the record was right—First, because the court did not have authority of law to hear and determine the subject-matter of the suit, nor of suits of the class to which it belonged; and, second, because the record exhibits no proof of the publication or posting of the notice to the defendants, as required by the laws of Kentucky.

We think the first objection is answered by reference to the statute laws of Kentucky in force at the time. Section 8 of the act of the general assembly of Kentucky approved December 19, 1795, "to establish district courts in this commonwealth," provided as follows: "The jurisdiction of the said district courts, respectively, shall be over all persons, and in all causes, matters, and things at common law or in chancery, arising within their districts," excepting actions of assault and battery, or suits for slander, and subjects of controversy of less than £50 in value. 1 Littell, Laws Ky. 298. Section 4 of the act approved December 19, 1796, directing the method of proceeding in courts of equity against absent debtors and other absent defendants, provides for constructive service by publication "in all cases whatever when a suit is or shall be pending in any court of chancery, concerning any matter or thing whatever, against any absent defendant or defendants." 1 St. Laws (M. & B.) 93. These provisions of the statute law are ample to confer jurisdiction on the court where the property in controversy is within its territorial jurisdic-

tion, and are so clear as to require no discussion of the question; for, as was said in *Grignon's Lessee v. Astor*, 2 How. 338, "the power to hear and determine a cause is jurisdiction. If the law confers the power to render a judgment or decree, then the court has jurisdiction."

But it is objected to the record that it does not show publication and posting of notice to the defendants, as required by the order of the court and by law. The law is found in section 2 of the act of December 19, 1796, *ubi supra*, and is as follows: "The court shall also appoint some day in the succeeding term, for the absent defendant or defendants to enter his, her, or their appearance to the suit, and give security for performing the decree, a copy of which order shall be forthwith published in the Kentucky Gazette or Herald, and continued for two months successively, and shall also be published on some Sunday, immediately after divine service, in such church or meeting-house as the court shall direct, and another copy shall be posted at the front door of the said court-house."

The plaintiffs in the present case offered evidence outside the record to prove the fact that the order was published in the Kentucky Gazette, as required by the statute, by calling the assistant librarian of the public library at Lexington, "having with him," as the bill of exceptions states, "printed newspapers which appeared to be of great age, and which purported to be the original files of the newspaper called the Kentucky Gazette, published weekly, and plaintiffs showed, in nine successive issues of said newspaper, weekly publications, beginning with December 12, 1798, and ending with February 7, 1799, of" the order of the court above mentioned. But no proof was offered to show the publication of the order at the church or meeting-house, or the posting of it at the front door of the court-house. After the lapse of more than 80 years proof not of record of these facts was clearly impossible. The fact, therefore, that after the lapse of so long a time the plaintiffs were able to show that the order of the court had been obeyed, by its publication in a newspaper, was persuasive evidence that the other requirements of the order had also been performed.

But the record contained no proof of the publication and posting of the notice as required by the statute, and it is insisted by the defendants in this case that the record itself must show the publication and posting of the notice as required by law, otherwise the jurisdiction of the court does not appear, and its decree is absolutely void. While it must be conceded that, in order to give the court jurisdiction over the persons of the defendants, all the steps pointed out by the statute to effect constructive service on non-residents were necessary, yet it does not follow that the evidence that the steps

were taken must appear in the record, unless, indeed, the statute expressly or by implication requires it. The court which made the decree in the case of *Clark v. Conkling* was a court of general jurisdiction. Therefore every presumption not inconsistent with the record is to be indulged in favor of its jurisdiction. *Kempe's Lessee v. Kennedy*, 5 Cranch, 173; *Voorhees v. Bank of U. S.*, 10 Pet. 449; *Grignon v. Astor*, 2 How. 319; *Harvey v. Tyler*, 2 Wall. 328. It is to be presumed that the court, before making its decree, took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed. That this presumption is authorized will appear by the following cases:

In *Harvey v. Tyler*, *ubi supra*, the court, speaking by Mr. Justice Miller, said: "The jurisdiction which is now exercised by the common-law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. * * * In all cases where the new powers thus conferred are to be brought into action in the usual form of common-law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made as in cases falling more strictly within the usual powers of the court."

In *Hall v. Law*, 102 U. S. 461, the validity of a partition of lands made by a circuit court of the state of Indiana was attacked. This court, speaking by Mr. Justice Field, said: "All that" the statute "designates as necessary to authorize the court to act is that there should be an application for partition by one or more joint proprietors, after giving notice of the intended application in a public newspaper for at least four weeks. When application is made, the court must consider whether it is by a proper party, whether it is sufficient in form and substance, and whether the requisite notice has been given, as prescribed. Its order made thereon is an adjudication in these matters."

The case of *Voorhees v. Bank of U. S.*, 10 Pet. 449, was an action of ejectment, and the case turned on the validity of a sale of the premises in controversy under a judgment of the court of common pleas of Hamilton county, Ohio, in a case of foreign attachment. The sale was attacked on the following among other grounds: (1) Because the statute authorizing the proceeding by foreign attachment required that an affidavit should be made and filed with the clerk before the writ issued, and no such affidavit was found in the record; (2) because the statute directed three months' notice to be given, by publication in a newspaper, of the issuing of the attachment, before judgment should be entered, and also required

15 days' notice of sale to be given, neither of which appeared by the record to have been done; (3) because the statute required that the defendant should be put in default at each of the three terms preceding the judgment, and the default entered of record, but no entry was made of the default at the last of the three terms. But the court overruled the objections, and sustained the validity of the judgment and the sale. It said: "But the provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance shall appear on the record. The thirteenth section of the attachment law, which gives to the conveyances of the auditors the same effect as a deed from the defendant in the attachment, contains no other limitation than that it shall be 'in virtue of the authority herein granted.' This leaves the question open to the application of those general principles of law by which the validity of sales made under judicial process must be tested, in the ascertainment of which we do not think it necessary to examine the record in the attachment, for evidence that the acts alleged to have been omitted appear therein to have been done."

The result of the authorities and what we decide is that where a court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction, that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid. The case of *Galpin v. Page*, 18 Wall. 350, cited by counsel for defendant, is not in conflict with this proposition. The judgment set up on one side and attacked on the other in that case was rendered on service by publication. The law permitted service to be made by publication only where certain facts were made to appear to the satisfaction of the court, and the court by a precedent order, which must necessarily appear of record, authorized service to be made by publication. But the record showed no such order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual. See, also, *Pennoyer v. Neff*, 95 U. S. 727, 734.

It results from the views we have expressed that the judgment of the circuit court of Kentucky must be reversed, and the cause remanded, with directions to grant a new trial.

NITCHE et al. v. EARLE.

(19 N. E. 749, 117 Ind. 270.)

Supreme Court of Indiana. Jan. 29, 1889.

Appeal from circuit court, Lake county; E. C. Field, Judge.

Action by John G. Earle against J. A. Nitche and others. Nitche appeals. Const. Ind. art. 4, § 19, requires that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. * * *" By Rev. St. Ind. 1881, § 1065, which is included in the article entitled "Ejectment," and the section preceding which provides for a new trial of right, "if the application for a new trial is made after the close of the term at which the judgment is rendered, the party obtaining a new trial shall give the opposite party 10 days' notice thereof before the term next succeeding the granting of the application."

J. Kopelke, for appellant. C. F. Griffin, for appellee.

OLDS, J. This action was commenced by appellee against appellant on the 2d day of March, 1881, in the Lake circuit court, to recover the possession of, and quiet title to, a tract of land in Lake county, Ind. Issues were formed, and the cause tried by the court at the November term, 1881, and judgment rendered for appellee upon a special finding of facts. From that judgment appellant Nitche appealed to this court, and the cause was reversed. Nitche v. Earle, 88 Ind. 375. Under the direction of this court, the court below, at the September term, 1883, entered judgment for appellant upon the special finding of facts. At the February term, 1884, the plaintiff obtained a new trial as of right. At the April term, 1884, appellant appeared to the action, and moved the court to vacate the order granting the new trial for the insufficiency of the bond, which motion was overruled; and at the September term, 1884, appellant moved to vacate the order granting a new trial for failure of the plaintiff below, the appellee, to give notice thereof, which motion was overruled, to which ruling appellant excepts. Another trial was had at the February term, 1886, and judgment rendered in favor of appellee. Motion was made by appellant and his co-defendants for new trial, and the motion overruled, and excepted to by appellant. The errors assigned are that the court erred in overruling the motion of appellant to vacate the order granting the appellee a new trial, for the reason that no notice was given thereof, and the overruling of the motion for new trial.

There was no error in overruling appellant's motion to vacate the order granting a new trial. In the case of Stanley v. Holliday, 113 Ind. 525, 16 N. E. 513, this court has placed a construction on section 1065,

Rev. St. 1881, and the court in that case says: "The intention of the legislature in requiring that 'the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term next succeeding the granting of the application,' as we construe such requirement in connection with the other provisions of the statute relating to new trials as of right, was to prevent either party from forcing the opposite party into trial at or during the term at which the new trial was granted, or before the term next succeeding. This provision of section 1065 was rendered necessary, we suppose, to prevent the plaintiff in such a case from forcing defendants into trial during the term at which the new trial was granted, under the provisions of section 516, Rev. St. 1881." Under this authority the action of the court was right in granting the new trial, and overruling appellant's motion to vacate for failure of notice.

Several questions are presented upon the overruling of the motion for new trial. The first is admission by the court in evidence, over objection of appellant, of a certified copy of the record of a patent by the state of Indiana to George Earle for the real estate described in the complaint, which record of patent was certified to by James H. Rice, auditor of state. It is urged that it is shown on the face of the record not to be the copy of any record; that for all it shows on the face of it it may be the original patent; that it has the signatures of the governor and secretary of state, and nowhere has a certificate of the secretary of state that he recorded it, and counsel insist that, unless the instrument shows, by official entries or certificates by officers who made it, that it is a record, it is no record; that a volunteer statement by the present keeper, giving his opinion about it, will not make it a record; that by the original law these records were to be kept in the office of the secretary of state; that the certificate of the auditor of state should show how he came by the book.

The instrument offered and admitted in evidence was a certified copy of letters patent to George Earle for the land in question in this case, the auditor of state certifying the same to be "a full, true, and complete copy of the record of letters patent executed and issued on the 12th day of January, 1857, by the state of Indiana to George Earle, for the lands therein described, as the same appears on page 379 of the Record of Swamp Lands, Vol. 33, Range West, now on file in my office, and of which record I am the legal custodian," properly signed by the auditor of state, and seal attached. By section 5628, Rev. St. 1881, all records pertaining to swamp lands were transferred from the office of the secretary of state to the office of the auditor of state. Section 462 prescribes the manner in which all copies of records in public offices shall be certified, and makes

them admissible in evidence. The statute makes the auditor of state the proper custodian of the record of letters patent which were formerly recorded by the secretary of state, and kept in his office, and this copy of the record was properly authenticated. Section 4, *Gavin & H. St. 607*, made it the duty of the secretary of state to record these letters patent in books to be kept in his office. Thus it was first provided by statute and made the duty of the secretary of state to record the letters patent in a book in his office, and afterwards this record was by statute transferred to the office of the auditor of state. Courts take knowledge of the public statutes of the state, and, in the absence of evidence to the contrary, the presumption of law is that the officers discharge their duties; and the presumption in this case would be that the secretary of state recorded the patent, and that the record book containing the same had been by him turned over to the auditor of state. *Evans v. Browne*, 30 Ind. 514; *Ward v. State*, 48 Ind. 289; *Evans v. Ashley*, 22 Ind. 15.

The next question presented is that the appellant called one Johannes Kopelke as a witness, and offered to prove that he had examined the book from which the auditor of state took his copy of the pretended record of the Earle patent; that it contained no official certificate, and was not on the outside designated as a record book. The issue of patents was required by statute to be recorded. The statute providing for the record simply made it the duty of the secretary of state to record them "in books to be kept in his office." It does not require the book to be designated on the outside as a "Record of Patents," or to have any indorsement whatever on the same, or that the secretary of state shall attach any certificate to the same. So the evidence excluded was improper, and the ruling of the court was correct.

Appellant also offered to prove by A. D. Palmer, a witness on his behalf, who had also purchased the same tract of land of the state, and obtained a patent therefor, May 2, 1866, and through whom appellant claimed title, that before he purchased the land in controversy of the state he made search at the state and county offices, and could find no previous conveyance of record. It also appears in the record that appellee offered in evidence the deposition of Erasmus B. Collins, who testified in said deposition that he was the same Collins who was secretary of state of the state of Indiana, and signed said letters patent to Earle, and that he recorded it in volume 33, *Record of Swamp Lands in the State of Indiana*, on page 379, and that said record was made January 12, 1857; also the deposition of James H. Rice, the auditor of state, to show that said record had been transferred to the office of the auditor of state, and was in his possession at the time of making the certificate; which

depositions were objected to by counsel for appellant, on the ground that it was an attempt by said depositions to prove matters of record by parol evidence, and the objection was sustained, and the depositions excluded.

The evidence of Palmer was to show the absence of a record in the office of the secretary of state which the deposition sought to show was made and was in said office at the time and long before the making of the patent to Palmer. If parol evidence was proper to show there was no such record made or kept in the office of the secretary of state at a certain time, then certainly evidence to show that such record was in fact made and was in the office at that time was proper. A party must be consistent. If he objects and secures a ruling against his adversary excluding evidence on a particular subject, he cannot be heard to complain when the court applies the same rule, and excludes evidence offered by him to establish the opposite of what his adversary had attempted to prove by the evidence which was excluded on his objection. In the case of *Dinwiddie v. State*, 103 Ind. 101, 2 N. E. 290, this court says: "It is settled by the adjudications of this court that a party cannot make available for the reversal of a judgment the exclusion of evidence, where, upon his objection, like evidence was excluded when offered by the other party." *Hinton v. Whittaker*, 101 Ind. 344. And this doctrine applies with full force to the objection raised by appellant to the exclusion of the testimony of Palmer. The law did not require these patents to be recorded in the recorder's office. It is so decided in case of *Mason v. Cooksey*, 51 Ind. 519, and is recognized as the law by this court in the former decision of this case.

It is contended that the law providing for the recording of letters patent in the office of the secretary of state is unconstitutional, for the reason that it does not come within the provisions of section 19, art. 4. Const. We think otherwise. The title to the original act to which this was supplemental was entitled "An act to regulate the sale of swamp lands donated by the United States to the state of Indiana, and to provide for the draining and reclaiming thereof, in accordance with the condition of said grant." The title is broad enough to cover all things done in connection with the sale, and in connection with the execution of the patent. The statute provides that the secretary of state, one of the officers who signs it, shall record it in his office. It is ordered recorded in connection with the making of the patent, and the title is broad enough to cover the provisions of the act requiring the record.

It is claimed that, as the appellee never had possession of the real estate, it is incumbent on him, to entitle him to a recovery, to show a complete chain of title from the United States down to him. This theory is not tenable in this case. Courts of this state

take knowledge of the acts of congress granting to this state swamp land, which, taken in connection with the patent from the state, makes a complete chain of title. In addition to this, it is a well-settled principle that, when plaintiff and defendant claim through a common source of title, it is sufficient for the plaintiff to deduce his title from the common source of title. In this case both plaintiff and defendant claim title from the state

of Indiana, and it was only incumbent on the plaintiff to show that he had the better title from the state. *Smith v. Lindsey*, 89 Mo. 76, 1 S. W. 88; *Miller v. Hardin*, 64 Mo. 545; *Miller v. Surls*, 19 Ga. 331; *Barnard v. Whipple*, 29 Vt. 401.

The evidence supports the finding of the court. We find no error for which the cause ought to be reversed.

Judgment affirmed, with costs.

UNITED STATES v. BELL et al.

(4 Sup. Ct. 498, 111 U. S. 477.)

Supreme Court of the United States. April 21, 1884.

In error to the district court of the United States for the Northern district of Mississippi.

Asst. Atty. Gen. Maury, for plaintiff in error.

Chas. F. Benjamin and Richard McAllister, for defendants in error.

WAITE, C. J. This was a suit upon the bond of a purser in the navy, and at the trial a transcript from the books and proceedings of the treasury department was offered in evidence, authenticated in the following form:

"Treasury Department, Fourth Auditor's Office, Washington, D. C., Feb. 11, 1881.

"Pursuant to section 886 of the Revised Statutes of the United States, I, Charles Beardsley, fourth auditor of the treasury department, do hereby certify that the annexed is a transcript of the books and proceedings of the treasury department, in account with Miles H. Morris, late paymaster in the United States navy, under bond of April 9, 1858.

Charles Beardsley, Auditor."

"Be it remembered that Chas. Beardsley, Esq., who certified the annexed transcript, is now, and was at the time of doing so, fourth auditor of the treasury of the United States, and that full faith and credit are due to his official attestations.

"In testimony whereof, I, John Sherman, secretary of the treasury of the United States, have hereunto subscribed my name and caused to be affixed the seal of this department, at the city of Washington, this eleventh day of February, in the year of our Lord 1881."

"[Seal of Department.] John Sherman,
"Secretary of the Treasury."

An objection to the admission of the evidence on the ground that the "transcript was not certified as required by law," was sustained by the court, and that is assigned

for error here. In our opinion the certificate was sufficient. Section 886 of the Revised Statutes provides that "when suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the treasury department, certified by the register and authenticated under the seal of the department, or, when the suit involves the accounts of the war and navy departments, certified by the auditors respectively charged with the examination of those accounts and authenticated under the seal of the treasury department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly." This suit involved the accounts of the navy department. The fourth auditor is charged by law with the duty of examining all accounts accruing in that department. Rev. St. § 277, subd. 5. He has certified under his hand that the paper offered in evidence "is a transcript of the books and proceedings of the treasury department in account with" the purser whose bond is in suit, and the secretary of the treasury has certified, under the seal of the department, to the official character of the auditor, "and that full faith and credit are due to his official attestations." What more need be done to authenticate the transcript under the seal of the department we are at a loss to determine. The certificate of the proper auditor is attached, and his certificate attested by the secretary of the treasury under the seal of the department. The form of the certificates and the mode of affixing the seal correspond exactly with what appears in *Smith v. U. S.*, 5 Pet. 292, where it was held, more than half a century ago, that the seal affixed in this way was sufficient for the purposes of evidence under a statute, of which section 886 is a re-enactment. The transcript is certified by the auditor, and authenticated under the seal of the treasury department, affixed by the secretary, its lawful custodian.

The judgment is reversed, and the cause remanded, with instructions to set aside the verdict and grant a new trial.

ALEXANDER v. PENNSYLVANIA CO.

(30 N. E. 69, 48 Ohio St. 623.)

Supreme Court of Ohio. Dec. 8, 1891.

Error to circuit court, Mahoning county.

This action was brought in the court of common pleas of Mahoning county by Alexander, the plaintiff in error, to recover against the defendant in error, the Pennsylvania Company, damages for injuries sustained by him while in its employment. He recovered a judgment in that court, which was reversed by the circuit court of Mahoning county in proceedings instituted for that purpose by the defendant in error, whereupon this proceeding was brought to obtain a reversal of the judgment of the circuit court, and to affirm that of the court of common pleas. Affirmed.

Jones, Anderson & Terrell, for plaintiff in error. Thomas W. Sanderson and J. R. Carey, for defendant in error.

BRADBURY, J. The record discloses that the plaintiff in error, a boy of about 16 years of age, was in the service of the defendant as one of a gang of men engaged in relaying the track of a branch of defendant's railroad. That his work mainly consisted in carrying water for the other members of the gang; occasionally, however, he assisted in the work they were doing. That on the day he was injured a train of cars, loaded with cinders for ballasting the track, was waiting to be unloaded; and that, as he was climbing on one of the cars, or perhaps had gotten on it, to help unload the cinders, the train was started forward, by reason of which he was thrown from the car, under its wheels, receiving, besides other lesser injuries, one necessitating the amputation of a leg between the ankle and knee. The foreman of the gang discharged and employed men, had immediate control of them while at work, and of the work being done. Undoubtedly, according to the law of this state, he was such a representative of the company as would render it liable to one of the gang of men under his control, who should be injured by his negligence. At this point there is a conflict in the testimony respecting the conduct of the plaintiff in error and the foreman, and the immediate circumstances under which the plaintiff went upon the car and the train put in motion; but there is evidence from which the jury could find that the foreman ordered the plaintiff to assist in unloading the cinders; that, in obedience to this order, he attempted to climb upon a car; that he did so in a reasonably careful manner; and that the foreman carelessly, even recklessly, ordered the train to be moved forward before the plaintiff had secured himself a safe footing upon the car he was attempting to board, thereby throwing him from it, and under its wheels, causing the injury of which he complains; thus giving to the plaintiff, according to the law of Ohio, a right of action against the railroad company.

The real questions in contention between the parties in this court arise out of the fact that the accident occurred in the state of Pennsylvania. The defendant in error (also defendant in the court of common pleas) interposed in the last-named court, among other defenses, the following: "For a second defense it says that said plaintiff entered into its employ within the state of Pennsylvania, and was employed to serve the defendant within the said state of Pennsylvania, and with reference to the laws of said state of Pennsylvania. It says, further, that under the laws of said state of Pennsylvania, within which said contract was made, and where said plaintiff was acting as an employee of the defendant, the plaintiff and all the other employees, including said gang boss named in plaintiff's petition, engaged upon and about the train in the unloading of the same, are held to be fellow-employees, and for the negligence of either resulting in injury to the other the common master, to-wit, the defendant, is held not to be liable to the other. Wherefore this defendant asks to be dismissed, with its costs." The sufficiency of this defense is denied by counsel for plaintiff in error in a forcible and ingenious argument, in which they specially criticise the averment, "are held to be fellow-employees," etc. It is true, there is no direct averment that any of the courts of Pennsylvania so held, but the liberal rules applicable to the construction of pleadings in this state require us to infer that the pleader so intended. No objection, by motion or otherwise, was made to the form of this defense in the court of common pleas, or, so far as the record discloses, at any stage in the progress of the case, until made by counsel in their brief filed in this court. Under this defense a number of the decisions of the supreme court of Pennsylvania were introduced in evidence to establish the rule of law attempted to be set up by this answer. Whether upon motion, made at the proper time, the defense should have been made more certain and definite, we need not inquire; for at this late stage in the proceedings, after a strongly contested trial, mainly had upon the issues made by the very defense, and the reply denying its truth, the defense should receive the most favorable construction its language will permit; and when the pleader has averred, as in this defense, that "under the laws of the state of Pennsylvania * * * the plaintiff and the 'gang boss' * * * are held to be fellow-servants," it is entirely reasonable to infer that the alleged holding was by the courts of that state, having authority to declare and announce the rules of law operative therein.

The record of the proceedings in the circuit court is ambiguous. One of the assignments of error made in that court by the defendant in error here was that the court of common pleas erred in overruling its motion for a new trial, and one of the grounds for a new trial stated is that the motion was that the verdict was contrary to the weight of the evidence; so that the circuit court had before it for de-

cision that question; and, had it reversed the judgment of the court of common pleas on that ground, this court would not have reversed its action, and the same result would have followed from a general judgment of reversal,—that is, one specifying no particular ground for the action of the court,—for in that case, as the court might have reversed the judgment on the ground that it was contrary to the evidence, this court cannot say that was not the ground of its action. *Titus v. Lewis*, 33 Ohio St. 304. In the case at bar, however, there is an attempt to state in the journal entry of the circuit court the grounds of its action in reversing the judgment of the court of common pleas, as follows: “*First*. The court finds from examination of record and bill of exceptions that it was not controverted in the trial in the court below but that there were officers of the Pennsylvania Company superior in authority to Frank Kennan, who had the right and authority to contract and supervise his action in conducting the work, and controlling the men during the work in which the plaintiff below was engaged at the time he received the injury. *Second*. The court holds as conclusion of law that the determination of this case must be governed by the law in the state of Pennsylvania. *Third*. The court further finds as a conclusion of law, from the reports of the decisions of the supreme court of Pennsylvania, contained in the record, that said Frank Kennan was a fellow-servant and co-employee with said Alexander at the time he received his injury; and, therefore, that plaintiff in error is not liable for the alleged negligent acts of said Kennan, which caused the injury to defendant in error. To all of which holdings defendant in error excepted.” This is not, in the correct and legal sense of the term, a finding of the facts in the case, and a statement of them separately from the conclusions of law arrived at by the court, although it closely resembles it in form; for it is not within the province of the circuit court, in a proceeding in error before it, to find from the evidence contained in the bill of exceptions the facts, and state them separately from its conclusions of law. *Senff v. Pyle*, 46 Ohio St. 102, 24 N. E. Rep. 595; *Young v. Pennsylvania Co.*, 46 Ohio St. 558, 24 N. E. Rep. 595. Neither does it give as the ground of the reversal any one of the errors assigned in that court. What it really does disclose is that the circuit court, being of opinion that the law of Pennsylvania should govern the case, the verdict of the jury was against the weight of the evidence, because from a consideration of the whole evidence it appeared that the plaintiff in error was a fellow-servant of the “gang boss,” by whose negligence he was injured; and that in such case the law of Pennsylvania would not permit a recovery to be had against the railroad company, in whose service both were at the time engaged. It may be considered, therefore, as fairly shown by the record, that the circuit court would not have reversed the judgment of the court of common pleas if it had not held the case to be governed by the law of that state. It

therefore becomes material to inquire if the circuit court was right in this respect.

The first branch of the inquiry concerns the method by which the law of Pennsylvania is to be determined. Is it to be found as matter of fact by the jury from the evidence, or judicially declared by the court? That it is a fact to be determined by the jury is, we think, a well-established principle of law. *Ingraham v. Hart*, 11 Ohio, 255; *Bank v. Baker*, 15 Ohio St. 68; *Williams v. Finlay*, 40 Ohio St. 342. It does not follow from this, however, that where, as in the case at bar, numerous decisions of the several courts of a state are introduced in evidence to a jury as proof of the law of such state, the jury should be required to search through them, and elucidate and announce the doctrine they establish. This is often a most difficult and delicate duty for courts and judges of the greatest skill, learning, and experience to undertake. To submit its performance to a body of men inexperienced in the examination and construction of judicial decisions, and not familiar with the general doctrines pertaining to the subject, would be to submit the rights of parties involved in the controversy to be determined by a method little, if any, more certain than the cast of a die. In such case it becomes the duty of the court, as in the case of any other documentary evidence requiring construction, to construe the decisions, the rulings of the trial court in this respect being subject to review by other courts having jurisdiction in error, thus securing as much certainty in ascertaining the law of another state or country as the nature of the subject will admit. *Di Sora v. Philipps*, 10 H. L. Cas. 624; *Bremer v. Freeman*, 10 Moore, P. C. 306; *State v. Jackson*, 2 Dev. 563; *Cobb v. Transportation Co.*, 87 Mo. 90; *Kline v. Baker*, 99 Mass. 253; *Thomp. Trials*, § 1054. The record discloses that the contract by which the plaintiff in error was employed was made in the state of Pennsylvania; that his services were to be rendered wholly within that state, and that he was injured therein. If the right of a servant to recover damages from his master on account of an injury received through the negligence of a superior servant of the same master arises out of contract, then the case of *Knowlton v. Railway Co.*, 19 Ohio St. 269, is decisive of the case at bar. The syllabus of that case reads: “The defendant is a common carrier of passengers, incorporated by the laws of New York, and was sned as such common carrier on account of injuries received by the plaintiff whilst being carried as a passenger from one point to another on defendant’s road, and wholly within said state. The injury was charged to have been occasioned by defendant’s negligence. The pleadings show the plaintiff was being carried gratuitously at the time of the accident, under a contract by which plaintiff assumed all risks of accident and injury arising from negligence, etc., and such contract is valid by the laws of New York. Held, that the validity of the stipulation exempting the defendant from liability for negligence must be determined by the laws of New York,

within whose jurisdiction the contract was made and to be executed; and as the plaintiff, under his contract, could have no right of action in the courts of New York, so his action cannot be maintained in this state."

In *Railway Co. v. Ranney*, 37 Ohio St. 665, MCLVAIN, J., said, (page 669:) "The principles of law in relation to the liability of a master for an injury to his servant while engaged in the performance of duties under his employment have been so frequently considered and declared by this court, and upon such varied statements of fact, that one might be justified in assuming that the law upon this subject, in all its bearings, has been fully settled. The respective rights and duties of employer and employe sound in contract. The employer implicitly engages to use reasonable care and diligence to secure the safety of the employe, and, among other things, to exercise reasonable care in the selection of prudent fellow-servants. He also engages that every one placed in authority over the servant, with power to control and direct him in the performance of his duties, will exercise reasonable care in providing for his safety, whether such superior be a fellow-servant or not, in the ordinary sense." There is strong ground to contend that Judge MCLVAIN states the rule correctly. But however that may be, and whether the action of the plaintiff in error sounds in contract or tort, in either case we think it is to be governed by the law of Pennsylvania. If the acts of the parties impose no obligations on the one hand and confer no rights upon the other, where they occur, no good reason is apparent why they should spring into active existence the moment the parties pass into another jurisdiction, where, if they had occurred therein, such relative rights and obligations would

have resulted. An act should be judged by the law of the jurisdiction where it was committed. The party acting or omitting to act must be presumed to have been guided by the law in force at the time and place, and to which he owed obedience. If his conduct, according to that law, violated no right of another, no cause of action arose, for actions at law are provided to redress violated rights. Nor is it material that the rules of Pennsylvania law that deny relief to plaintiff in error result from the adjudications of the courts of that state, instead of being legislative enactments. The rules of law established by judicial decisions are as binding as legislative enactments until modified or overturned by other decisions or legislative enactments binding within that jurisdiction. In theory it may be true that there is no common law of Ohio or of Pennsylvania; that the common law is one and the same in every state acknowledging its obligations; and that the decisions of one state are but evidence of it, not binding upon the courts of any other state; but, as matter of fact, we know that, in the application of the rules of the common law to the affairs of men, there is, unfortunately, in the several states, a wide divergence; and that it necessarily follows that acts and transactions sufficient in one state to create a cause of action will not produce that result in another, and in the administration of justice mere theory must be made to yield to the truth as established by facts and experience. Other questions were urged upon our consideration by counsel in argument, some or all of which may be material upon the retrial of the action, but they are not presented by the record in such manner as to authorize their consideration at this time, and will not be noticed. Judgment affirmed.

WISEMAN v. NORTHERN PAC. R. CO.

(26 Pac. 272, 20 Or. 425.)

Supreme Court of Oregon. March 31, 1891.

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

On March 19, 1890, the plaintiff, J. J. Wiseman, commenced an action in the circuit court of the state of Oregon for the county of Multnomah against the defendant, to recover the sum of \$398.72, the value of certain household goods claimed to have been lost by defendant in transit. The complaint alleges that on or about the 8th day of April, 1889, at Nunica, Mich., the plaintiff delivered to the Detroit, Grand Haven & Milwaukee Railway Company a shipment of six boxes, one trunk, one roll of carpet, and two barrels containing household goods, the property of the plaintiff, for transportation to Salem, Or.; that said shipment was in due time delivered in good order to the defendant as a connecting carrier; and that one of said boxes and one of said barrels, with their entire contents, were destroyed, and never delivered to plaintiff, which household goods so destroyed were of the value of \$373.05. The defendant, in its answer to the complaint, admits the shipment by plaintiff, and the delivery to the Detroit, Grand Haven & Milwaukee Railway Company, of the household goods in question, and that the same was in due time received by defendant from the Detroit, Grand Haven & Milwaukee Railway Company, a connecting carrier; admits that one of the boxes and one of the barrels, with the contents, were destroyed, but denies any knowledge as to the contents or value thereof. For a further and separate answer and defense, defendant alleged that the shipment of freight mentioned in the complaint consisted of household goods, and that the same was shipped by plaintiff, and received and accepted by the Detroit, Grand Haven & Milwaukee Railway Company, as well as the defendant, a connecting line, under a contract with plaintiff that, if for any cause there should be a total loss of said freight, and a liability on the part of the common carrier receiving the same, or over whose line the same was being or was transported, the total liability therefor, if any there should be, would be the sum of five dollars per hundred pounds weight of said freight, and the same was received and accepted by defendant and shipped by plaintiff on said condition. The defendant, further answering, and as a separate defense, alleged that at the date of shipment by plaintiff, to-wit, April 8, 1889, in order to obtain the benefit of the reduced rate of freight charges from the ordinary tariff rate charged therefor, the plaintiff and the Detroit, Grand Haven & Milwaukee Railway Company contracted and agreed in writing that, in consideration of such reduced rates, the plaintiff, in case of any damage or loss to said goods arising by damage by fire while at stations or in transit, would and did release said company, and each and every other company over whose lines said goods might pass to destination, from any and all damage occurring

to said goods; that said plaintiff was given and obtained the benefit of said reduced rates, and executed said contract of release accordingly. The reply denies the new matter alleged in the answer. On the trial the plaintiff gave evidence tending to prove the issues on his part, and then rested. Defendant then gave evidence tending to prove the execution by plaintiff of the release and contract mentioned in the answer; that it was executed in duplicate, one copy being attached to the bill of lading, and the other was by the agent of the Detroit, Grand Haven & Milwaukee Railway, at Nunica, Mich., forwarded to the traffic manager of that road, at Chicago, Ill. Defendant then called Alfred Watts, who was then clerk of the Northern Pacific Railroad, at Portland, Or., who testified that he was clerk in the office of Mr. Fulton, general freight agent of the defendant at Portland; that he had telegraphed to the claim agent of the defendant at St. Paul to ascertain if a release had been made on the plaintiff's shipment of goods from Nunica, and, if so, to send the original release that was signed by Mr. Wiseman; that the claim agent at St. Paul telegraphed back that the files in the office of the traffic manager at Chicago had been searched, and the release could not be found; that the release never was in his office at Portland, and the parties who handled the way-bill of plaintiff's goods said there was no release attached to it when it reached its destination. The defendant then offered the deposition of the agent at Nunica to prove the contents of the release, but the court refused to admit secondary evidence of its contents, to which ruling defendant duly excepted, and assigns the same as error on this appeal.

Dolph, Bellinger, Mallory & Simon, for appellant. *J. N. Teal and Sanderson Reed*, for respondent.

BEAN, J., (after stating the facts as above.) By section 691, Hill's Code, it is provided that "there shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases: * * * (2) When the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default." This section is a declaration of the common-law rule. The theory upon which secondary evidence of the contents of a writing is admitted is that the original writing cannot be produced by the party by whom the evidence is offered, within a reasonable time, by the exercise of reasonable diligence. The question is always one of diligence in the effort to procure the original. No precise rule has been or can be laid down as to what shall be considered a reasonable effort, but the party alleging the loss or destruction of the document is expected to show "that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." 1 Greenl. Ev. § 558; *Simpson v. Dall*, 3 Wall. 460; John-

son v. Arnwine, 42 N. J. Law, 451; Kelsey v. Hanmer, 18 Conn. 310. Thus, in *Mariner v. Saunders*, 5 Gilman, 117, the court says: "From the nature of the subject there is some difficulty in laying down a general rule defining the extent and vigilance of the search which a party must make before the court may conclude that the paper is destroyed or lost." As a general rule, however, we may say that when, from the ownership, nature, or object of a paper, it has properly a particular place of deposit, or where, from the evidence, it is shown to have been in a particular place, or in particular hands, then that place must be searched by the witness proving the loss, or the person produced into whose hands it has been traced. The extent of the search to be made in such place or by such person must depend in a great degree upon the circumstances. Ordinarily it is not sufficient that the paper is not found in its usual place of deposit, but all papers in the office or place should be examined. On the whole, the court must be satisfied that the paper is destroyed, and cannot be found. It is true the party need not search every possible place where it might be found, for then the search might be interminable, but he must search every place where there is a reasonable probability that it may be found." This rule is founded on reason and justice, and to require any less degree of diligence would be to defeat the object of reducing agreements to writing. As was said in *Rankin v. Crow*, 19 Ill. 629: "The party wishing to avail himself of the benefit of such secondary evidence should be required to make at least the same effort that is expected the party would make if he were to lose the benefit of the evidence if the instrument were not found." The degree of diligence which shall be considered necessary, in any case, will depend upon the character and importance of the document, and the purposes for which it is expected to be used, and the place where a paper of that kind may naturally be supposed to be found. If the document be a valuable and important one, which the owner would be likely to preserve, a more diligent search will be required than if the document is of little or no value. The purposes for which it is proposed to use it on the trial will also have an important bearing in determining the degree of diligence required. If the cause of action or defense is founded on the supposed writing, the party offering the evidence will be required to show a greater degree of diligence in the attempt to produce the original than if it is desired to be used as evidence in some collateral matter. The proof of search and proof of loss required is always proportionate to the character and value of the paper supposed to be lost. *Insurance Co. v. Rosenagle*, 77 Pa. St. 514. The existence and contents of the supposed contract, as well as the claim of defendant based upon it, is denied by the plaintiff in the case at bar. The issue thus being joined, its execution and contents were very material to defendant in establishing its defense. Indeed, defendant seeks to exempt itself from liability solely by reason of this contract. It admits having re-

ceived, as a common carrier, plaintiff's goods, and that while in its possession they were destroyed, but it seeks to escape liability by virtue of this contract. It then became of the utmost importance to both plaintiff and defendant that the original contract, if such a contract was made at all, be produced on the trial, so that there might be no controversy as to its contents, and that the court might declare its legal effect to the jury. Before defendant should be permitted to give secondary evidence of its contents it should prove that it had exercised the utmost diligence to procure the original, (*Smith v. Cox*, 9 Or. 327), and this it failed to do. No competent evidence whatever was offered to prove any search in the office of the traffic manager at Chicago, where it was shown the document was most likely to be found. All that the witness Watts said about the supposed search was clearly hearsay and incompetent evidence. *Lawrence v. Fulton*, 19 Cal. 683. It did not in any way tend to prove that any effort had been made in the Chicago office to find the original paper. The testimony of the traffic manager, or some person in his office, having the custody of such papers, should have been had, or some proper effort made to obtain it, showing what effort, if any, had been made to find the original.

Indeed, counsel for defendant did not seriously contend that it had brought itself within the rule concerning the admission of secondary evidence, if proof of the loss of the original is required, but he claimed that all that was necessary for defendant to do was to show that the original was in the possession of a person outside of this state, and that no further proof was required; that, when it showed that the original contract was in Chicago, it was entitled to give secondary evidence of its contents without further proof; and in support of his position cites the following authorities: *Burton v. Driggs*, 20 Wall. 134; *Gordon v. Searing*, 8 Cal. 49; *Beattie v. Hilliard*, 55 N. H. 428; *Brown v. Woods*, 19 Mo. 475; *Shepard v. Giddings*, 22 Conn. 282; *Ralph v. Brown*, 3 Watts & S. 395; *Gordon v. Tweedy*, 74 Ala. 232. The broad doctrine is stated in these authorities that, if books or papers necessary as evidence in a court in one state be in the possession of a person living in another state, secondary evidence, without further showing, may be given to prove the contents of such papers. As we have already said, in effect, each case must largely depend on its own particular circumstances as to what showing is sufficient in order to admit secondary evidence of the contents of a writing, and the language used in the cases above cited must be interpreted in the light of the facts of each case. None of these cases go so far as to hold that where a defendant relies upon the contents of a writing to exempt himself from liability, and both the execution and contents of the supposed writing are denied, and the alleged writing is shown to be in the possession of a person outside of the state, secondary evidence of the contents of such writing is admissible unless an effort is made to produce it. And, be-

sides, the doctrine stated in these authorities is denied by authorities of equal weight, and even by some of the same courts. Thus, in *Turner v. Yates*, 16 How. 14, it was held that proof that an invoice of goods was in London was not a sufficient showing to admit secondary evidence of its contents, in the circuit court of the United States for the district of Maryland, the court saying: "If the paper was in the hands of the consignees in London, secondary evidence was not admissible; if as parties, they were entitled to notice to produce the paper; if as third persons, their depositions should have been taken, or some proper attempt made to obtain it." To the same effect are *Hoyt v. McNeil*, 13 Minn. 394, (Gil. 362;) *Dickinson v. Breeden*, 25 Ill. 186; *Mc-*

Gregor v. Montgomery, 4 Pa. St. 237; *Whart. Ev.* § 130. The rule laid down in the authorities just cited, we think, is founded on reason and justice, and imposes no hardship on the defendant. By defendant's own showing the last known place of deposit of the contract it claims plaintiff executed was in the office of the traffic manager in Chicago, and the law provides an easy and simple method of taking the deposition of a witness residing out of the state, and his deposition should have been taken or some proper effort made to obtain it. The fact that the person to whose possession the paper was traced resided out of the state did not excuse defendant from a diligent effort to procure it. Judgment of the court below is therefore affirmed.

ISLEY v. BOON et al.

(13 S. E. 795, 109 N. C. 555.)

Supreme Court of North Carolina. Nov. 10, 1891.

Appeal from superior court, Alamance county; Edwin T. Boykin, Judge.

This was an action by Christian Isley against John Boon and others to try title to land. There was judgment for defendants, and plaintiff appeals. Reversed.

On the trial it became material for the plaintiff to produce in evidence the record of a special proceeding, and the following is so much of the case stated on appeal for this court in respect thereto as need be reported:

"The plaintiff then introduced the letters of administration issued to E. S. Parker upon the estate of Samuel Adams, deceased, issued by the clerk of the superior court of Alamance county, under his official seal of the 8th day of November, 1875. The plaintiff then proposed to show a sale of the land in controversy, by E. S. Parker, administrator of Samuel Adams, deceased, on the 3d day of April, 1876, (under special proceeding taken by him in the superior court of Alamance county, for the purpose of creating assets for the payment of debts of his intestate,) to John Ireland, the last and highest bidder, and a deed made on the 5th of January, 1881, to the heirs at law of the said John Ireland, who had theretofore died intestate, after having paid the whole of the purchase money for said land to the administrator, Parker. To establish such special proceedings the plaintiff put in evidence two summonses issued by the clerk of the superior court of Alamance county under his official seal, bearing date of November 27, 1875, entitled 'E. S. Parker, as administrator of Samuel Adams, against John Adams, John Boon and wife, Robena, Jacob Hicks and wife, Piety,' commanding the sheriff to summon the defendants to appear at the office of the clerk of the superior court of said county within twenty-one days after the service of summons on them, to answer the complaint to be therein filed, one of which summonses was directed to the sheriff of Alamance county, and was returned by the sheriff of said county as served upon John Boon and wife, Robena, on the 24th of January, 1876. The other was directed to the sheriff of Forsyth county, and was returned by the sheriff of said county on the 24th of January, 1876, as served on Jacob Hicks and wife, Piety; also the petition of E. S. Parker, administrator of Samuel Adams, deceased, against John Adams, John Boon and wife, Robena, Jacob Hicks and wife, Piety, filed in said court, praying for a license to sell the real estate described in the petition, the same being the land in controversy in this action, as the property of Samuel Adams, deceased, to create assets for the payment of the debts of his intestate, subject to the right of the dower of

the widow of said deceased, which said petition was verified before the clerk of said court on the 20th day of January, 1876. Plaintiff also introduced an order directing publication to be made in the Alamance Gleaner, a paper published in Alamance county, for six weeks.

"The plaintiff introduced A. Tate, and showed by him that he was the clerk of the superior court of Alamance county from 1878 to the first Monday in December, 1890, who testified that the two summonses, together with the petition of E. S. Parker, administrator of Samuel Adams, deceased, and the order of publication, which were introduced by the plaintiff, were (records) found by him in the office of the superior court of Alamance county. He also proved that W. A. Albright was his immediate predecessor in the clerk's office of said county, and that he well knew his handwriting, and that the signature to the two summonses, and also to the verification to the petition and the signature to the order for publication, were his handwriting. Witness also testified that the case of E. S. Parker, administrator of Samuel Adams, deceased, against John Adams, John Boon and wife, Robena, Jacob Hicks and wife, Piety, appeared in the summons docket of said superior court; and, further, that he had made diligent search in his office for the order of sale, the report of sale, the decree confirming the sale by E. S. Parker as administrator to John Ireland, or any other papers or records belonging to said case in said office, but was unable to find such. Witness testified that he found no other entry of the case upon docket or records than the statement of the case and the issuing of the summonses. He stated that he found no minutes, or memorandum, or order upon said records.

"The plaintiff then introduced E. S. Parker, the administrator of Samuel Adams, deceased, and, after exhibiting a written notice to the defendants that the plaintiff would offer parol evidence of the existence of the records and orders and proceedings in the special proceeding for the sale of the land of the said Samuel Adams, deceased, and the loss or destruction of said records, and of the plaintiff's purpose to show the contents thereof by parol, proposed to prove by him the issuing of the summonses hereinbefore mentioned and the fact of the filing by himself, in the office of the clerk of the superior court, of the petition, hereinbefore mentioned, for the sale of land to make assets, and an order for publication, and that the said petition and order were in his handwriting, and signed by him as attorney and petitioner, and were the original papers they purported to be. Plaintiff further proposed to prove by said witness the existence of an order adjudging that publication had been made for the defendant John Adams, a non-resident, and of a decree of the said court in the said special proceeding directing him, as the ad-

ministrator of Samuel Adams, to sell the land described in his petition at public auction at the court-house in Graham, to the highest bidder, for cash, after duly advertising the same, and that the proceeds of the sale be assets in his hands for the payment of debts; it being adjudged that there was no personal estate of said intestate with which to pay debts; also that he made said sale, after due advertisement, on the 3d day of April, 1876, at the court-house in Graham, when and where John Ireland became the purchaser at the price of \$50.50, and paid the purchase money down, and that he made no report of said sale to the court; also a decree of the court made, confirming said report and sale, and directing the said administrator to make title in fee to the purchaser; and further proposed to prove by said witness that, the said John Ireland having died soon thereafter, after having paid for said land, he made and executed a title deed to the heirs at law of the said John Ireland, deceased, being the grantors named in the said administrator's deed, which deed was made on the 5th of January, 1881. And plaintiff further proposed to prove by said Parker that he afterwards saw on several occasions said special proceeding, petition, and other orders, order of sale, report of sale, and decree confirming said sale, etc., in the clerk's office as records of said court, and knew that all of said orders did exist and were on file in said office, and that diligent search has been made since in said office for them. Upon objection by the defendants to the proposed evidence of the witness E. S. Parker, as hereinbefore set forth, the court sustained the said objection, and refused the proposed evidence, to which ruling of the court the plaintiff excepted. The plaintiff then proposed to introduce in evidence the deed executed by E. S. Parker, administrator of Samuel Adams, to J. R. Ireland, W. F. Ireland, Samuel Ireland, W. S. Caffey and wife, Caroline, C. Isley and wife, Louisa, for the land in controversy, bearing date 5th day of January, 1881, which deed has been duly proven and registered, and insisted upon the title derived from said deed, as well as recitals contained therein, as evidence of the existence of the record and other proceedings recited in said deed under the law and the maxim, 'omnia præsumuntur rite esse acta.' The court, upon objection of the defendants, refused to admit the evidence offered, and the plaintiff excepted. Upon the in-

timination of the court the plaintiff submitted to a nonsuit and appealed."

L. M. Scott, for appellant. J. A. Long, W. P. Bynum, Jr., and Batchelor & Devereux, for appellees.

MERRIMON, C. J. The evidence proposed and rejected on the trial must be accepted for the present purpose as true, because it was material; and, if it had been submitted to the jury, they might have believed and so treated it. The facts showed that material parts of the record of the special proceeding referred to had been lost or destroyed. The clerk of the court, the proper custodian of the record, made diligent search in his office for such parts of it as were alleged to have been lost, and he was unable to find them. It must be taken that he made such search where, regularly, they ought to be, and generally through his office, where he might hope to find them. He failed to find them, if they ever existed. They were lost or destroyed. It is not suggested that they were not, nor did the court found its opinion upon such supposition. Then, if the parts of the record specified were lost or destroyed, it was clearly competent to prove on the trial by secondary evidence such loss or destruction, and also what the nature, meaning, and purport of such lost parts were. It has been so expressly decided. In *Mobley v. Watts*, 98 N. C. 284, 3 S. E. 677, Justice Davis said: "If the record is lost, and is ancient, its existence and contents may sometimes be presumed; but, whether it be ancient or recent, after proof of the loss its contents may be proved, like any other document, by secondary evidence, where the case does not from its nature disclose the existence of other and better evidence." This case, it seems to us, plainly comes within what is said and decided in the case just cited. Indeed, it is well settled that where the record is lost, that it existed, and its purpose and contents, may be proven, on the trial of any action where it becomes material, by secondary evidence. The loss or destruction of the record should, however, be made to appear clearly before receiving such secondary evidence. *Stanly v. Massingill*, 63 N. C. 558; *Yount v. Miller*, 91 N. C. 331; *Hare v. Holloman*, 94 N. C. 14. There is error. The judgment of nonsuit must be set aside, and the case disposed of according to law. To that end let this opinion be certified to the superior court. It is so ordered.

GOODRICH v. WESTON.

(102 Mass. 362.)

Supreme Judicial Court of Massachusetts.
Worcester. Oct. Term, 1869.

C. H. B. Snow, for plaintiffs. G. A. Torrey, for defendant.

WELLS, J. The defendant, by giving notice to produce the original letters written by him to the plaintiffs, had entitled himself to prove their contents by secondary evidence. He produced copies, made by his wife from his letter book, into which the originals had been first copied by a machine press; and testified that he had compared these copies with those in the letter book, and that they were correct. He also testified that he deposited the originals in the postoffice, directed to the plaintiffs. The offer to send for the letter book, and produce it in court, if desired, must be taken at least to relieve the defendant from any suspicion that the letter book was improperly kept back. The objection to the admissibility of the copies stands, therefore, strictly upon the legal ground stated, namely, "that they were not copies of the originals, and that the letter book itself would be the best evidence."

Whenever a copy of a record or document is itself made original or primary evidence, the rule is clear and well settled that it must be a copy made directly from or compared with the original. If the first copy be lost, or in the hands of the opposite party, so long as another may be obtained from the same source, no ground can be laid for resorting to evidence of an inferior or secondary character. The admission of a transcript

from the record of a deed or other private writing, for the record of which provision is made by law, is not an exception to, but only a modification of, the same rule. But when the source of original evidence is exhausted, and resort is properly had to secondary proof, the contents of private writings may be proved like any other fact, by indirect evidence. The admissibility of evidence offered for this purpose must depend upon its legitimate tendency to prove the facts sought to be proved, and not upon the comparative weight or value of one or another form of proof. The jury will judge of its weight, and may give due consideration to the fact that a less satisfactory form of proof is offered while a more satisfactory one exists and is withheld, or not produced when it might have been readily obtained. But there are no degrees of legal distinction in this class of evidence. Although there has been much diversity of practice, and the decisions are far from uniform, more frequently turning upon special circumstances and facts than upon a general principal, the tendency of authority is, as we think, towards the establishment of the rule here stated. 2 Phil. Ev. (4th Am. Ed.) 568; 1 Greenl. Ev. §§ 84, 582; Stetson v. Gulliver, 2 Cush. 494; Robertson v. Lynch, 18 Johns. 451; Winn v. Patterson, 9 Pet. 663; Brown v. Woodman, 6 Car. & P. 206; Doe v. Ross, 7 Mees. & W. 102.

In this case the letter book, if produced, would have been only secondary evidence. We are satisfied that the copies, admitted by the court below, were sufficiently verified to justify their admission as competent evidence of the contents of the original letters.

Exceptions overruled.

FORD et al. v. CUNNINGHAM et al. (No. 12,044.)

(25 Pac. 403, 87 Cal. 209.)

Supreme Court of California. Dec. 20, 1890.

Department 1. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

J. M. Lesser, Spalsbury & Burke, and Garber, Boalt & Bishop, for appellants. A. S. Kittridge, for respondents.

PER CURIAM. The only question litigated in the court below was whether the barley was sold by the plaintiffs to the defendant Cunningham, or to the firm of Cunningham & Co., of which he was a member. The appellants contend that the evidence is insufficient to support the findings, but we think there was sufficient evidence on behalf of the defendants to create a substantial conflict, and under the well-established rule we should not interfere with the findings of fact.

The plaintiffs, to establish their case against the copartnership, relied mainly on documentary evidence, some of which they claimed was in possession of the defendants, who were asked at the trial to produce the same. Mr. Morey, one of the plaintiffs, was permitted by the court to state the contents of certain bills and letters which he claimed had been addressed and sent to Cunningham & Co. Objection was made by the defendants to the introduction of oral testimony as to the contents of the bills and letters, and the objection was overruled. We think the court erred in its ruling. The witness

stated that he had no personal knowledge that the communications addressed to Cunningham & Co. were mailed, except that copies thereof appeared in the plaintiffs' copy-book, and that it was a general custom of his firm to place letters in a box in the store, from which they were taken to the post-office. No foundation, therefore, was laid for the introduction of the evidence. Assuming that secondary evidence could under such circumstances be introduced, the press copies were the best evidence next to the originals themselves. The ruling was on a material matter, because the defendants testified that they never received the communications referred to. *Brailsford v. Williams*, 74 Amer. Dec. 562.

Mr. Middleton, one of the defendants, was called as a witness, and identified the ledger of the copartnership, showing the account of Ford & Co. with Cunningham & Co. from September 1, 1884, to the date of trial. It was admitted by the plaintiffs that the entries therein were original entries, but they objected to the introduction of the same as evidence on the ground that it was irrelevant, immaterial, and incompetent. The objection was sustained by the court, to which ruling the defendants excepted. There was no item of barley in the account offered. The ruling, we think, was error. The witness had stated that the ledger showed the true state of account between plaintiffs and defendants, and that the items had been entered by him at the time of the several transactions therein mentioned. *Landis v. Turner*, 14 Cal. 573. Judgment and order reversed, and cause remanded for a new trial.

CORNETT v. WILLIAMS.

(20 Wall. 226.)

Supreme Court of the United States. Oct., 1873.

Error to the circuit court of the United States for the Western district of Texas.

C. S. West, G. F. Moore, and John Hancock, for plaintiff in error. A. J. Hamilton, J. A. Buchanan, and Mr. Jackson, for defendant in error.

Mr. Justice SWAYNE delivered the opinion of the court.

There was no error in admitting in evidence the two depositions of H. H. Williams. The objections that he was a party to the record, and interested in the event of the suit, were obviated by the third section of the act of July 2, 1864. 13 Stat. 351. He was thus placed upon a footing of equality with all other witnesses, and it was competent for him to testify in the case orally or by deposition. The depositions were taken and certified in conformity to the thirtieth section of the act of 1789. 1 Stat. 89. If the deponent was not satisfied with his first deposition, he had the right to give a second one. No order of the court was necessary in either case. The only objections insisted upon are that the statute does not authorize a party to testify by deposition if he can orally, and that if he can by deposition, the right was exhausted by the first one, and that the second one was taken without authority of law. Both objections are without foundation. The statute is remedial and to be construed liberally. We are aware of no case in which it has been held that where a witness has given one deposition in an action at law, he cannot for that reason give another without the sanction of the court. Such a proposition has the support of neither principle nor authority.

The instruction given to the jury touching the trust deeds executed by W. H. and J. H. Williams to Wildbahn, the notes they were given to secure, and the sale by Cornett of the slaves, which was in part the consideration of the notes, was well warranted by the state of the evidence and was correct. It was objected to only upon the ground that the evidence did not tend to prove that the slaves were removed from Missouri to Texas for the purpose of selling them in the latter state, and that hence the instruction, even if correct as matter of law, was, with reference to the case, an abstraction, and must necessarily have had the effect of confusing and misleading the minds of the jury. An examination of the record has satisfied us that the evidence was abundantly sufficient to raise the question of intent in the removal of the slaves, and to make it the duty of the court to say to the jury what was said upon the subject. It is not objected that the rule of law was not correctly stated.

What was done in the suit between Cornett and J. H. and W. H. Williams in no wise affected the rights of H. H. Williams in this action. The marshal seized the premises, and Cornett gave a replevin bond pursuant to the statute of Texas. While the property was in the hands of the marshal it was in the custody of the law. When Cornett gave the bond the premises passed from the custody of the law into his possession, and they were in his possession when this suit was instituted. The bond was given to enable him to effect that result, and it was accomplished. The bond took the place of the property and represented it. The premises were as much in his possession as if no litigation was pending and he had acquired possession in some other way. The defendant in error, having declined to become a party to that suit, everything done in it was, so far as he was concerned, *res inter alios acta*.

The secondary proof of the judgment in favor of H. H. Williams, against Samuel M. Williams, was properly admitted. The original record was destroyed by fire in the year 1862. The proof in question consisted of a copy of a copy of the judgment, the latter duly certified by the clerk of the court by whom the judgment was rendered. It was proved that the certified copy had been destroyed. The judgment in question was recovered upon a prior judgment in favor of the same plaintiff against the same defendant. There was evidence tending to show that a certified copy of the latter existed, but it was not positive. There was no proof of the existence of such a copy of the judgment sought to be proved. There was a discrepancy as to a single word in the copy offered in evidence. It set forth that the clerk had assessed the damages at "forty-three thousand nine hundred and sixty-six dollars and thirty-four cents, and that it was, therefore, considered by the court that the plaintiff recover of the defendant the sum of forty-three thousand nine hundred and thirty-six dollars and thirty-four cents," &c. It was satisfactorily proved aliunde that thirty, instead of sixty, was correct, the latter being a mistake of the copyist.

The principle established by this court as to secondary evidence in cases like this is, that it must be the best the party has in his power to produce. The rule is to be so applied as to promote the ends of justice and guard against fraud, surprise, and imposition.¹ The copy here in question was properly admitted.² This court has not yet gone the length of the English adjudications, which hold, without qualification, that there are no degrees in secondary evidence.³

The act of congress of March 3, 1871,⁴ pro-

¹ Renner v. Bank of Columbia, 9 Wheat. 597; 1 Greenl. Ev. § 84, and note.

² Winn v. Patterson, 9 Pet. 676.

³ Doe d. Gilbert v. Ross, 7 Mees. & W. 106.

⁴ 16 Stat. 474, c. 111.

vides for putting in a permanent form proof of the contents of judicial records lost or destroyed, such proof to take the place of the original records for all purposes. The statute of Texas upon the subject of proof in cases of lost records,⁵ has also been referred to in this connection. There is nothing in either the act of congress or the statute in conflict with the action of the court we have been considering.

The most important question in the case relates to the proceedings of the county court of Galveston county, touching the sale and conveyance of the premises in controversy by the administrator of Samuel M. Williams to H. H. Williams. The plaintiffs in error insist that those proceedings were *coram non judge* and void. The defendant in error maintains that they were regular and valid, and that if there be any error or defect, the court having had jurisdiction, its proceedings could not be collaterally assailed upon the trial of this cause in the court below. This renders it necessary to examine the case in this aspect. The record shows the following facts: On the 28th of June, 1850, H. H. Williams recovered in the district court of the United States held at Galveston, against Samuel M. Williams, then living, a judgment for \$26,736. And on the 12th of July, 1858, another judgment for the sum of \$43,936.34. The second judgment was founded upon the first one, and was for the principal and interest due upon the latter. At the January term, 1866, of the Galveston county court, H. H. Williams, by his counsel, applied for an order that the administrator of Samuel M. Williams be cited to appear and show cause why "he should not make application to the court for an order to sell enough of the property of said estate to pay a judgment obtained by the said Henry Williams against the said Samuel M. Williams, to the amount of \$40,000; which said judgment was allowed and approved as a valid claim against said estate, in October, 1859, with eight per cent. interest per annum," &c.

The administrator appeared at the same term, and answered that the plaintiff recovered the judgment first hereinbefore mentioned; that it was presented for allowance against the estate with the usual affidavit and allowed; that he could not say whether it was approved by the chief justice of Galveston county; that it had never been paid, and that the reason he had taken no measures to pay it was that the plaintiff had told him that, being against his brother, he did not intend to enforce it. The court thereupon, at the same term, made an order as follows:

"On this day came on to be heard in this cause the motion of Henry Williams, by his agent, J. H. Williams, asking that the administrator be required to sell sufficient prop-

erty of the estate to pay a certain judgment obtained by the said Henry in the United States district court, on the 28th day of June, A. D. 1850, for the sum of twenty-six thousand seven hundred and thirty-six dollars, with interest from date of rendition; and it appearing to the court that this claim has been duly allowed, and that the administrator has no funds in hand whatever to pay the same, it is ordered that he make sale of sufficient property in pursuance of the prayer of the motion. And the administrator having designated the following piece of property, it is ordered that he shall make public sale of one league of land, situated," &c.

The premises in controversy were then described, the mode and time of advertising, and the place and terms of the sale were prescribed and the administrator was directed "to make due report of his action in the premises to the court." On the 15th of March, 1866, the administrator reported that, pursuant to the order of the court, after due notice according to law, he had offered the premises for sale at public auction, at the time and place required by law, and that they were struck off and sold to Henry H. Williams, for the sum of \$60,000, on a credit of twelve months, secured by a vendor's lien; that Williams was the highest and best bidder, and that the price was a reasonable one.

At the March term the court confirmed the report and ordered the administrator to make a deed to the purchaser, upon his complying with the terms of the sale. On the 15th of April, 1866, the administrator gave a receipt to the purchaser for \$60,600, being the amount of the purchase-money with ten per cent. interest, and by the same instrument released his vendor's lien. On the same day the administrator executed a deed of conveyance to the said H. H. Williams. It recites all the proceedings touching the sale upon which it was founded.

On the 2d of January, 1868, the administrator executed to Henry Williams another deed for the same premises. It recites more fully the proceedings relative to the sale, and sets out that there were certain clerical errors of dates in the former deed, and that this deed was made to correct them.

The titles adverse to the plaintiff, developed upon the trial in the court below, were all derived from heirs-at-law of Samuel Williams. The premises were liable under a paramount lien for the debts of the ancestor.⁶ The plaintiff's claim was of that character. Hence, if the sale and conveyance to him by the administrator were valid, they were conclusive in his favor. He could recover, however, only upon the strength of his own title. The weakness of the title of his adversaries could not avail him.

Most of the objections to the sale by the administrator taken in the brief of the plaintiffs in error, were not insisted upon in the

⁵ Pasch. Dig. art. 4969.

⁶ Pasch. Dig. art. 1373.

argument at the bar, and are of such a character as to require no observations from the court. One was pressed upon our attention with earnestness and ability, and to that one our remarks will be confined.

A statute of Texas requires all claims against the estate of a decedent to be presented to his legal representative and to be allowed by such representative, and to be approved by the probate judge. Until so allowed and approved they have no legal validity and cannot be recognized as debts against the estate. If disallowed, or not approved, they must be sued upon within three months. If sued without a refusal to allow or approve, there can be no recovery. The absence of such fact is fatal to the action.⁷

The order of sale sets forth that the claim had been allowed by the administrator, but is silent as to its approval by the judge. The plaintiffs in error argued that this omission rendered the order a nullity.

The application of the judgment-creditor and the answer of the administrator gave the judge jurisdiction over the parties and the real estate of the deceased.⁸ Jurisdiction is the power to hear and determine. To make the order of sale required the exercise of this power. It was the business and duty of the court to ascertain and decide whether the facts were such as called for that action. The question always arises in such proceedings—and must be determined—whether, upon the case as presented, affirmative or negative action is proper. The power to review and reverse the decision so made is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding had directly for that purpose. It cannot and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things and irreversible for error. In the absence of fraud no question can be collaterally enter-

tained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue if the rule were otherwise. These remarks apply to the order of sale here in question. The county court had the power to make it and did make it. It is presumed to have been properly made, and the question of its propriety was not open to examination upon the trial in the circuit court. These propositions are sustained by a long and unbroken line of adjudications in this court. The last one was the case of *McNitt v. Turner*.⁹ They are not in conflict with the adjudications of Texas upon the subject.

The statute of Texas does not require the evidence upon which the judgment of the court proceeded to be set forth in the record. Such a statement can do no good, and its omission does no harm.

As regards public officers, "acts done which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."¹⁰ "Facts presumed are as effectually established as facts proved, where no presumption is allowed." In the case of *Ward's Lessee v. Barrows*,¹¹ a sale for taxes came under examination. It was held that certain acts of the county auditor were presumptive proofs that he had administered to the collector the oath prescribed by law touching the delinquent list. The sale was sustained. Here the judge who made the order of sale was the judge to approve the claim. The order was presumptive proof of the requisite approval. Such approval was necessarily implied, and what is implied in a record, pleading, will, deed, or contract, is as effectual as what is expressed.¹²

The proceedings touching the sale were properly admitted in evidence, and the instruction given to the jury upon the subject was correct.

The last assignment of error relates to fraud in obtaining the order of sale.

It seems to us that the evidence disclosed in the record was hardly sufficient to raise any question upon that subject. However that may be, the instruction given to the jury was unexceptionable, and the plaintiffs in error have no right to complain.

Judgment affirmed.

⁷ Pasch. Dig. arts. 1309, 1311; *Danzey v. Swinney*, 7 Tex. 625; *Martin v. Harrison*, 2 Tex. 456.

⁸ Pasch. Dig. art. 1305.

⁹ 16 Wall. 366.

¹⁰ *Bank of U. S. v. Dandridge*, 12 Wheat. 70.

¹¹ 2 Ohio St. 247.

¹² *U. S. v. Babbit*, 1 Black, 61.

LEESER v. BOEKHOFF.

(38 Mo. App. 445.)

Court of Appeals of Missouri. Dec. 24, 1889.

Christian & Wind, for appellant. Lubke & Muench, for respondent.

BRIGGS, J. On the twenty-third day of February, 1887, the defendant in this case instituted an attachment suit against one Caroline Gruhner. In the attachment suit, Boekhoff claimed that Mrs. Gruhner was indebted to him, and that she had fraudulently conveyed her property for the purpose of defrauding her creditors. Under the writ of attachment Boekhoff caused a stock of groceries to be seized as the property of Mrs. Gruhner, and the goods were subsequently sold by the officer, and the proceeds, after deducting costs, were applied to the discharge of Boekhoff's debt.

The plaintiff in the present suit claims that the stock of goods so levied on and sold belonged to him, and he asked a judgment against the defendant for damages for the unlawful conversion of his property. The defendant, in his answer, denied that the plaintiff was the owner of the goods, and he averred that the plaintiff claimed to be the owner of the property through a fraudulent purchase from Caroline Gruhner. The defendant attacked this sale, and alleged its invalidity as to him, for two reasons: First. The pretended purchase was fraudulent in fact, and was contrived to defraud the creditors of Mrs. Gruhner. Second. The sale was inoperative and void as to the defendant, for the reason that there was no such change of possession as would satisfy the interpretation placed by the supreme court on the first clause of section 2505, Rev. St. 1879. That portion of the statute referred to reads as follows: "Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continued change of the possession of the things sold, shall be held to be fraudulent and void, as against the creditors of the vendor," etc. The case was submitted to a jury, and the plaintiff obtained a verdict for five hundred dollars, and the court entered judgment accordingly. The suit was originally against the defendant and the Haase Fish Company, but, at the conclusion of the testimony, the plaintiff dismissed as to the fish company. The defendant in due time moved the court to grant him a new trial, and, his motion having been overruled, he has prosecuted this appeal.

The defendant assigns numerous errors, and he presents many arguments why the judgment ought to be reversed. He complains chiefly of the action of the court in refusing to take the case from the jury. He

also complains of the instructions, and the admission and rejection of evidence.

The case has been here before. *Leeser v. Boekhoff*, 33 Mo. App. 223. When the case was before this court on the former appeal, the plaintiff had obtained a joint judgment against the defendant and the Haase Fish Company as joint trespassers. The dismissal of the case as to the fish company eliminates from the case all questions as to the fact of a joint trespass, and the joint liability of the original defendants therefor. On the former appeal the defendant urged, as he does now, that the court ought to have declared as a matter of law that the sale of the goods by Caroline Gruhner to the plaintiff was invalid for the reason that the evidence did not show such a change of possession as the law contemplated and required. The opinion of the court on the former hearing contains a full recital of all substantial facts, showing the extent to which this possession was open, notorious, and unequivocal. This obviates the necessity of a re-statement of the evidence by us, as our examination of the present record leads us to the conclusion that on the last trial the evidence bearing on this issue was not substantially different from that contained in the former record. There were some additional facts shown on the last trial by both parties, which had a tendency to strengthen their respective theories, but this additional evidence was merely cumulative, and is not of such a character as to authorize us to hold that there has been a material change in the evidence. However, we are justified in saying that the plaintiff's evidence on the last trial was as satisfactory as that passed on by this court on the former hearing.

On the former hearing Judge Thompson disposed of the objection now urged by the defendant as follows: "We have already recited the substantial facts showing the extent to which the change of possession was open, notorious, and unequivocal, within the meaning of the statute. Certainly, several acts of possession were done by the plaintiff of an unequivocal character. He took possession by his own agent, who had not previously been in the employ of his vendor. He also began the purchase of goods in his own name, having the goods billed to him, and hanging the bills on a hook openly in the store, and also informed them that he had succeeded to the business. The fact that he did not do the other things which he might have done,—change the sign, the name on the wagons, and the revenue licenses, and the other circumstances of an equivocal character, already detailed,—were matters for the consideration of the jury, but were not of such a character that we can separate them from the things which were done, tending to apprise the community of the change of possession, which the statute requires." From this it appears that

this court expressly held that the plaintiff's evidence, bearing upon the circumstances attending the purchase, and the subsequent acts of the parties looking to a change of possession, were sufficient to carry the case to the jury, and it must now be held that the conclusion, arrived at by them, must be the law in this case. What was there decided is not now open for discussion, and must be held to be *res adjudicata*. This question involved the only substantial defense made by the defendant, and, unless the court has committed error in the instructions, or has admitted or rejected evidence which was prejudicial to the defendant's case, the judgment will have to be affirmed.

On the trial the plaintiff asked, and the court gave, the following instructions, to wit:

"Number 1. The court instructs the jury that in this state a debtor, even though insolvent, has the right to prefer one creditor over another; and if the jury believe, from the evidence, that the sole purpose of plaintiff in making the purchase in question was to secure payment or satisfaction of a debt, then due him from Caroline Grubner, then the transaction is not affected by the fact that said Caroline Grubner may have also been indebted to other creditors, or that the necessary effect of such purchase and sale may have been to hinder or delay such other creditors, provided the property so transferred and delivered to plaintiff, upon a fair valuation thereof at the time of the delivery, did not exceed the debt actually owing from Mrs. Grubner to him at said time.

"Number 2. The court further instructs you that if you find the facts called for by the preceding instruction, and also believe, from the evidence, that within a reasonable time after the execution of the bill of sale read in evidence, regard being had to the situation of the property therein conveyed, the plaintiff took actual, exclusive, open, notorious, and unequivocal possession of said property, and as called for in the instruction given for defendant, and thereafter continued in such possession to the date of the levy in question, and if you further find, from the evidence, that the defendant Boekhoff caused said property to be taken, or aided and abetted in the taking thereof, and to bring about the loss thereof to plaintiff, then your verdict should be for the plaintiff."

The court, on its own motion, gave the following instruction, to wit:

"The court instructs the jury that, if you believe and find from the evidence that the sale from Caroline Grubner to the plaintiff was not accompanied by delivery, and followed by a change of possession within a reasonable time, as stated and called for by the other instructions of the court, then said sale is void as against the defendant Boekhoff, even though you may find from the evidence that afterwards, and before the levy,

such change of possession was made. And if you find and believe from the evidence that such delivery and change of possession was not made within a reasonable time after said sale, as called for in the other instructions of the court, you should find for the defendant."

The defendant asked the court to instruct as follows:

"Number 1. Unless the jury are satisfied from the evidence that Charles Leeser had actual possession of the goods in question; that the change in possession was visible, continuous, and exclusive as against Caroline, such change of possession as to indicate to the public (purchasers) at large that Caroline Grubner no longer had possession of or control over said goods, then said sale was fraudulent and void as against creditors, even though the jury believe from the evidence the sale from Caroline Grubner to Charles Leeser was made in good faith and for a valuable consideration."

This instruction the court gave after striking out the word "public" and inserting "purchasers."

"Number 2. The court instructs the jury that, to render the sale valid, it was necessary that it should be accompanied by delivery within a reasonable time, regard being had to the situation of the property, and to be followed by an open, notorious, visible, and unequivocal change of possession, such as to indicate to persons visiting such store, at sight, that the ownership had changed. And if the jury find that such delivery and change was not made, they must find a verdict for the defendant, notwithstanding they may believe and find from the evidence that the sale was *bona fide*."

This instruction the court gave, after striking out the words "at sight," and also striking all the second part and inserting in lieu thereof the following:

"And if the jury find from the evidence that such delivery and change of possession was not made within a reasonable time after the sale by Caroline Grubner to the plaintiff, regard being had to the situation and character of the property, and not the mere convenience of the purchaser, then you must find a verdict for the defendant, even though you may also believe and find from the evidence that the sale was made in good faith."

The defendant also asked the court to instruct the jury that unless the sale was accompanied by delivery, and followed by a change of possession on or before the day after the sale, then it was not done within a reasonable time; which instruction the court refused to give.

We can see no substantial objection to the instructions. Every phase of the case was presented to the jury in a way that was quite favorable to the defendant, and the instructions are in harmony with the adjudications in this state. The defendant's instructions, as asked, were calculated to mis-

lead the jury, and the court was justified in refusing them.

The defendant asserts, as a matter of law, that a failure by a purchaser to take possession of property purchased within twenty-four hours will vitiate the sale, and that the trial court erred in refusing to so instruct the jury. The statute requires the possession to follow the purchase within a reasonable time. It is generally for the jury to determine what time would or would not be reasonable. It is impossible to formulate a definite rule on the subject. The question in each case must be determined by the circumstances attending the sale, and the character and situation of the property.

The defendant also assigns for error the refusal of the court to discharge the jury when notified of improper conduct on the part of one of the jurors. Whether this action of the court was prejudicial to the defendant or not, we cannot stop to inquire, for the reason that the record fails to show that the defendant excepted to the action of the court. Under well-established rules of appellate practice, we are prohibited from passing on the question.

The court permitted a witness, who had examined the account between the plaintiff and Mrs. Gruhner, to state the balance due the plaintiff. The defendant objected to this evidence for the reason that the books were not produced. It appeared that the officer levying the attachment in the suit of the defendant against Mrs. Gruhner had seized the books and carried them away. It has been held that a witness who has inspected the accounts between parties may be permitted to testify as to a general balance, but will not be allowed to give evidence of the particular contents of the books. 1 Greenl. Ev. (14th Ed.) § 93. But, aside from this, the defendant was not prejudiced by this evidence, for the reason that the plaintiff and Mrs. Gruhner both testified to the amount of the indebtedness, and there was no countervailing evidence tending to prove that Mrs. Gruhner was not indebted to the plaintiff in the amount claimed. We do not gather from the record that this fact was seriously controverted by the defendant on the trial of the case.

The next assignment of error relates to a claim of exemption made by Mrs. Gruhner in the attachment suit. It appears from the defendant's offer of proof that some time after the goods had been seized under the attachment Mrs. Gruhner filed a claim of exemption with the sheriff, in which she demanded a return of the property to her. The defendant offered this paper in evidence, and, on the plaintiff's objection, it was excluded.

The authorities cited by the defendant in support of this assignment are to the effect that admissions and declarations of parties, while in possession of property, are to be regarded as verbal acts, and are received as explanatory of the nature of their possession. This rule cannot be applied to the act of Mrs. Gruhner in claiming a right of exemption in the property held under the attachment, for the simple reason that she was not at the time in possession of the property. This assignment will have to be ruled likewise against the defendant.

And, lastly, the defendant complains of the action of the court in excluding the testimony of the plaintiff and Mrs. Gruhner at the former trial, which had been preserved in a bill of exceptions. We do not understand upon what principle this evidence could be held admissible. Such evidence must be placed in the category of hearsay testimony. If the testimony of a deceased witness is thus preserved, it may be read in evidence. This forms the exception to the general rule. *Coughlin v. Hauesler*, 50 Mo. 126. All the witnesses in this case were alive and present in court. In the case of *Bogie v. Nolan*, 96 Mo. 85, 9 S. W. 14, the deposition of one of the parties was read in evidence, although the parties were present in court. The trial court permitted it to be read as an admission of the party, and the supreme court sustained the ruling, and in doing so expressly overruled the case of *Priest v. Way*, 87 Mo. 16. There is quite a difference between the evidence of a party as preserved in a deposition and that contained in a bill of exceptions. The deposition is signed by the party, and duly authenticated by an officer, and from it can be ascertained with certainty the extent and character of any declaration or admission; but this cannot be said of a bill of exceptions. We know of no rule of law which would authorize the testimony of a party or witness contained in a bill of exceptions to be received as independent evidence, except in cases coming within the exception stated. It has been held that an abandoned pleading, signed by an attorney professing to represent the party, may be read in evidence as an admission or declaration of the client. *Dowset v. Rawlings*, 58 Mo. 75. But it is only *prima facie* admissible. The evidence of the attorney that the party did not employ him in the case renders the pleading incompetent evidence. *Anderson v. McPike*, 86 Mo. 233. We will have to rule this assignment against the defendant.

The judgment of the trial court will be affirmed.

All the judges concur.

BARNES et al. v. PACKWOOD et al.

(38 Pac. 857, 10 Wash. 50.)

Supreme Court of Washington. Nov. 10, 1894.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by S. W. Barnes and another, parties doing business as Barnes & McCandless, against S. T. Packwood and others. There was a judgment for defendants, and plaintiffs appeal. Reversed.

Ralph Kauffman, for appellants. Pruyn & Ready, for respondents.

DUNBAR, C. J. This is an action on a promissory note. The note sued upon is as follows: "\$1,500.00. Ellensburg, Wash., Oct. 8, 1888. One year after date, without grace, at 12 o'clock m., we, or either of us, promise to pay to the order of Barnes & McCandless, for the use of the Agricultural Fair Association, fifteen hundred dollars, U. S. gold coin, value received, with interest from date at the rate of one per cent. per month, interest payable when due, and, if not so paid, to become a part of the principal, and to bear like interest until paid. And further agreeing that if the same be not paid when due, and suit be brought to collect the same, or any portion thereof, to pay ten per cent. on the amount due as attorney's fee for collection. S. T. Packwood. Walter A. Bull. J. M. Shelton. A. B. Whitson. Thomas Haley. S. R. Geddis."

The defendants, answering the complaint, alleged that the note was signed in its present form through mistake; that the agreement and intention was that the note should be signed by the signers thereof as trustees of an association known as the "Agricultural Fair Association"; that they were not to be held individually responsible; that it was with this understanding that they signed it, and that it was the understanding of Barnes & McCandless, the plaintiffs, that it was so signed; that on the day the promissory note set out in the complaint was executed there was a meeting of the board of trustees of said corporation, at which meeting the defendants were present, and at said meeting a resolution was passed to borrow from said Barnes & McCandless, for and on behalf of said corporation, the said sum of \$1,500, and that the money was borrowed and the contract entered into in accordance with said agreement and resolution; alleging that the defendants received no benefit from said money; that it was turned over to the association, and that no consideration passed between the defendants and said Barnes & McCandless for said note. The plaintiffs objected to any testimony being heard under this answer, for the reason that it did not state facts sufficient to constitute a defense to the complaint. The court, however, overruled the objection, and the case went to trial. Plaintiffs offered the note in evidence,

proved its execution, and rested their case. The defendants' testimony was in accordance with the allegations of the answer, so that the question arises here, was the testimony for the defense sufficient to overcome the presumption arising from the execution of the note, the execution of which was admitted? The case was tried by the court, and a judgment rendered for costs for the defendants. It was contended by the appellants that the court erred in allowing the defendants to amend their answer at the trial, and in not giving judgment for the plaintiffs on the pleadings, inasmuch as three answers had already been filed in the cause, and that it was a clear abuse of the court's discretion to permit the filing of the fourth; that even that was insufficient, as it contains no allegation of a mutual mistake and such an allegation is necessary.

We think the answer substantially contains the allegation of mutual mistake, although not in so many words; and, the court having such a large discretion under our law and practice in matters of amendments, we do not think we would be justified in reversing the case for this reason. There is no allegation of fraud in the answer. The general rule laid down by the text writers is that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments, but that their interpretation must depend upon their own terms. But, to relieve parties from the distress of accident or mistake or fraud, courts of equity will admit parol evidence to qualify and correct, and, necessarily, sometimes, to even defeat, the terms of written instruments. "One of the most common classes of cases," says Mr. Story in his *Equity Jurisprudence* (volume 1, § 152), "in which relief is sought in equity on account of a mistake of facts is that of written agreements, either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended, sometimes it contains more, and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent until the contrary is established beyond reasonable controversy." It would certainly be a dangerous doctrine to announce that the terms of a written instrument should be varied, and its effect changed or destroyed, by any slight testimony, or mere preponderance of testimony. The very object of reducing agreements to writing is to prevent trouble arising from the defects of memory. All the agreements which have been talked

about by the parties leading up to the final agreement are presumed to be merged in the writing; and the object of this precaution would be destroyed, and it would have a tendency to encourage perjury, if upon slight testimony the sacredness of the written instrument could be destroyed. And such is almost the uniform holding of the courts. In *Townsend v. Stangroom*, 6 Ves. 339, Lord Eldon says that those producing evidence of a mistake undertake a case of great difficulty, and that the evidence must be irrefragable. In *Sable v. Maloney*, 48 Wis. 331, 4 N. W. 479, the court held that a written instrument would not be reformed on the ground of alleged mistake unless the party complaining move promptly after discovery of the mistake, and not then without clear proof. Said the court: "If the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief upon the ground that the written paper ought to be treated as the full and correct expression of the intent, unless the contrary is established beyond reasonable controversy. The parties to the deed, who appear to be equally credible, are in direct conflict, and there was no other direct evidence nor any surrounding circumstances in corroboration of the testimony of the grantor of the deed." So in the case at bar. The testimony of the defendants and the plaintiffs is in direct conflict. It matters not that there are four defendants and two plaintiffs. Even the burden of proof does not depend upon the number of witnesses who testify on the respective sides of the case. It was held in *Mead v. Insurance Co.*, 64 N. Y. 453, that, to justify the court in changing language of the written instrument sought to be reformed (except in case of fraud), it must be established that both parties agreed to something different from what is expressed in the writing, and the proof upon this point should be so clear and convincing as to leave no room for doubt. In *Stiles v. Willis*, 66 Md. 552, 8 Atl. 353, it was held that where application is made to a court of equity to have a mortgage deed reformed, by having a personal covenant inserted therein, as to one of the parties, alleged to have been omitted by mistake of the draughtsman, the proof must be of such a character as to leave no doubt whatever in the mind of the court that mistake has intervened, and that the instrument is variant from the actual contract of the parties; that it is not enough to show the intention of one of the parties to the instrument only, but the proof must establish incontrovertibly that the error in the instrument alleged was common to both parties. In other words, it must be conclusively established that both parties understood the contract as it is alleged it ought to have been expressed, and as in fact it was, but for the mistake alleged in reducing it to writing. This case is on a dead level with the case at bar, and, with the other cases above quoted, seems to

us to go to the extent of holding that the mistake must be established beyond a reasonable doubt. In *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45, the court said: "By the common law, parties who execute written instruments are bound by them, and parol evidence is not admissible to add to or diminish or vary their terms. The rule is of great practical importance for the protection of the interests of the citizen, and it is the more so since parties and interested witnesses are permitted to testify. The writing must be regarded, *prima facie*, as a solemn and deliberate admission of both parties as to what the terms of the contract actually were"; citing *Babcock v. Smith*, 22 Pick. 61, where the court held that "the power of rectifying and reforming solemn written contracts is one which by courts of general chancery jurisdiction is exercised very sparingly, and only upon the clearest and most satisfactory proof of the intention of the parties." And it is also asserted in *Stockbridge Iron Co. v. Hudson Iron Co.*, *supra*, that "the ordinary rule of evidence in civil actions, that a fact must be proved by a preponderance of evidence, does not apply to such a case as this. The proof that both parties intended to have the precise agreement set forth inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt."

The logic of the cases cited, even where it is not so specifically expressed, is that the proof of a mistake must be beyond a reasonable doubt. But we might still go beyond the question of mere preponderance, and yet not go to the extent of requiring the proof beyond a reasonable doubt. That a mere preponderance of the testimony will not be sufficient to overcome the presumption that the parties have expressed their agreement in the contract has been decided by this court in *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931. In that case there was an attempt to prove by parol evidence that an absolute bill of sale was given as a chattel mortgage; and the court, in speaking of the testimony in that case, says: "In such cases the solemnity of the writing is not to be overcome by a mere preponderance of evidence. The writing itself stands as the clearly-stated and deliberately ascertained intention of the parties, which must be enforced unless it is shown by clear, positive, and convincing evidence that the mutual intention was something else, and that it was with such different intention understood by both parties that the instrument was delivered and accepted. This is the rule in equity, where cases of this kind are most frequently heard; and when submitted to a jury the same rule applies." The rule is laid down in *Jones on Mortgages* (section 335) that one who alleges that his deed in absolute form was intended as a mortgage only is required to make strict proof of the fact; that the proof must be clear, unequivocal

ocal, and convincing; that the fact that the grantor understood the transaction to be a mortgage is not alone sufficient to prove it to be so, but if the evidence is doubtful and unsatisfactory—if it fails to overcome the strong presumption arising from the terms of the absolute deed by testimony entirely clear and convincing beyond reasonable controversy—the deed must have effect in accordance with its terms; that the unsupported testimony of the plaintiff, contradicted by the defendant, is insufficient to convert an absolute deed into a mortgage. Here it will be observed that it is the unsupported testimony of the defendants, contradicting that of the plaintiffs, which is relied upon to relieve the defendants from the obligation imposed by the written instrument. In *Purington v. Akhurst*, 74 Ill. 490, it was decided that where a bill of sale is made of vessels for one-half interest therein it will require evidence of the clearest character to show that it was intended only as a mortgage to secure a loan or advances. To the same effect is *Sewell v. Price's Adm'r*, 32 Ala. 97. "To show by parol that a deed absolute in form is a mortgage, the evidence must be clear and convincing." *McCormick v. Herndon*, 67 Wis. 648, 31 N. W. 303. "The rule in cases of this kind," said the court in *Cadman v. Peter*, 118 U. S. 73, 6 Sup. Ct. 957, "is well settled. If the conveyance was in fee, under covenant of warranty, and there is no defeasance, either in the conveyance or collateral paper, parol evidence to show that it was intended to secure a debt, and to operate only as a mortgage, must be clear, unequivocal, and convincing, or the presumption that the instrument is what it purports to be must prevail." See, also, *Howland v. Blake*, 97 U. S. 624; *Coyle v. Davis*, 116 U. S. 108, 6 Sup. Ct. 314; *Tilden v. Streeter*, 45 Mich. 533, 8 N. W. 502. If a mere preponderance of the testimony were all that was required to destroy the force of a written instrument, there would be very little use in reducing an agreement to writing; for the preponderance of testimony is required in any case to establish the affirmative propositions asserted. So that it must be seen that if any effect at all is given to a written instrument the rule of mere preponderance cannot attach.

In this case it had been several years from the time the note was given until the action was tried, and the testimony of the defendants satisfies us that their recollection of events which transpired at the meeting testified of could not be very definite or certain. Neither is the testimony of the defendants entirely harmonious. It is testified by the defendants that a resolution was passed by the board of trustees authorizing the borrowing of the money in question from Barnes & McCandless; that the trustees were called together for that purpose, and at the instance of Barnes, who was present when the reso-

lution was passed. This resolution is not even brought to bear in this case, but depends also upon the memories of the witnesses, for the records of the society had been burned between the time of the alleged passage of the resolution and the bringing of the action. One of the witnesses testified, in relation to the matter, that they all went down to the office of Barnes & McCandless and signed the note. Others are not certain where the note was signed, but think probably it was there, and are not able to remember who was present at the time of the signing. They all say that it was the understanding that they were not to be held liable as individuals, but as trustees, but the utterances which brought about the understanding are dragged out of the witnesses by direct and leading questions. Referring to the testimony of Walter A. Bull, for instance, when asked whether there was any talk about individual liability: "A. I think there was. Q. What was said about that? A. We wouldn't sign only for the corporation. Q. What did Barnes say about that? A. All right. Q. How much money do you remember was to be loaned? A. \$1,500. Q. You have heard the note in controversy there read? A. Yes. Q. Did you sign this note? A. Yes. Q. How did you come to sign this note? A. I signed the note for the association. Q. Was this note given in pursuance of the arrangement had there with Mr. Barnes? A. Yes. Q. Now, who drew up this note? A. I don't know. Q. Where did you sign the note? A. I think it was in Mr. Barnes' office. Q. When you signed it, whom did you intend to bind? A. The fair association. Q. Anybody else? A. No. Q. Did you intend to bind yourself? A. No. Q. Did you get any part of this money? A. No. Q. Any benefit directly or indirectly from it? A. No. Q. What was done with the money? A. I don't know. I think it was used for the fair association." So that it seems the memory of the witness is so faulty about the transaction that he is not even certain what use the money was put to for which he made himself responsible; and it is not sufficient that his intention was, at the time he signed the note, that he should not be bound individually; but to escape the responsibility of the individual note which he signed, under the plea of a mistake, it must not only plainly appear that it was his intention that he should not be bound, but it must as plainly appear that it was the intention of Barnes & McCandless. During the testimony given by Thomas Haley the following questions were answered: "Q. Do you remember any resolution being passed there? A. Yes. Q. Do you remember who drew it up? A. I don't remember who drew it up. I don't remember who was secretary. Q. Now, what else occurred there at that meeting? Was there any agreement made between the president and Mr. Barnes? A. Yes, sir. Q. State what that agreement was.

A. Mr. Barnes was to loan the association money, if the board of trustees would sign the note. Q. Sign the note how? A. As an association. Q. Was anything said about personal liability? A. No, sir. Q. Was there any talk there about the members of the board not wanting to be personally liable? A. There was talk about the members saying they wouldn't be personally liable." "This testimony contradicts itself, for if there was nothing said about personal liability there could not have been anything said about the members of the board being personally liable. The witness testifies, however, that Mr. Barnes was to loan the association money if the board of trustees would sign the note as an association. So it stands to reason, if this question of personal responsibility had been called to the minds of the defendants at that time, and they had refused to sign individually, but had especially agreed to sign as trustees, that they would have carried that agreement out by signing as trustees, instead of signing as individuals. The following excerpt is taken from the testimony of A. B. Whitson: "Q. You can state how you know this meeting was called for the purpose of passing this resolution. (Objected to.) Q. Did you hear Mr. Barnes talk about this matter? A. No, sir. Q. Did he say anything at the meeting about it? A. I don't remember what he said at this meeting. It was discussed at this meeting. Q. He was present at it? A. Yes. Q. Now, what was said there, in his presence, about why the resolution had to be passed? (Objected to. Sustained.) Q. Now, state what transpired at this meeting. A. We passed this resolution that we would borrow this money of Barnes & McCandless. Q. What were the contents of that resolution? Do you remember? A. I don't remember its contents exactly. Q. What was the substance of it? A. Well, the resolution was passed that we should borrow the money from him. Q. Do you know who prepared that resolution? A. The secretary. Q. Now, was there any agreement entered into there between the trustees for the corporation and Mr. Barnes? A. There was. Q. State what that agreement was. State what Mr. Barnes did. A. I don't know what Mr. Barnes said, but it was mutually understood. (Objected to "mutually understood.") The Court: You can state what the effect was of what was said. State in substance. A. There was a mutual understanding that we were to sign this note and get the money from Mr. Barnes. Q. How were you to sign it? A. Sign it as trustees of the association." So it will be seen from this testimony that the witness, instead of stating the facts from which a conclusion could be drawn by the jury or by the court, simply stated the conclusions, thereby making himself a judge of what state of facts would warrant Barnes in coming to the conclusion that he should look to the trustees instead of to the indi-

viduals who signed the note. Continuing: "Q. Was there anything said there about the individual liability of the trustees? A. Yes, sir. Q. What was said? A. I remember it was spoken of whether we would be individually liable in this or not. Q. Was that spoken of by the trustees? A. It was, in open meeting. Q. Was Mr. Barnes there? A. Yes. Q. Did Mr. Barnes say anything in answer to that? A. I don't remember as he did." In answer to the question, "How did you come to sign this note sued upon here as individuals?" the answer was: "I didn't sign it as an individual. I signed it as trustee, is my understanding. Q. Did any one advise you that this was the way to bind a corporation, and make a statement to that effect? (Objected to. Overruled.) A. I don't know as I had any advice on the subject. Q. Who drew up this note? A. I don't know." So that, so far as Whitson's testimony is concerned, it is simply conclusive of what his understanding was at the time the note was signed, without proving or tending to prove in any way the understanding of the plaintiffs.

The testimony of McCandless, on the other hand is to the effect that he was present at the time of the drawing up and signing of the promissory note in suit. He testifies that the president of the association came to the plaintiffs to know if they would loan the association some money, and the plaintiffs told him they would not loan it a dollar. "He then said, 'Will you loan it to us individually?' I told him we would, and he went in and came back, and we drew up a note, and he took it and had it signed. Q. When you say you would loan it to them individually, to what individuals did you refer? A. Well, during the conversation he mentioned the individuals who would sign the note, if we would let them have the money,—Mr. Packwood, Mr. Bull, Mr. Haley, Mr. Whitson, Mr. Geddis, and himself,—and we told him we would loan those gentlemen the money. Q. And you told him you would not loan the association a dollar? A. Yes, sir; that we would not loan it a dollar." This testimony is objected to by the respondents on the alleged ground that it does not refer to the same transaction. The witness states that it was on the same day—the day prior to the signing of this note—that this conversation occurred, and it is certainly as near the transaction as is the testimony of the defendants; for, according to their testimony, the resolution and agreement spoken of here were made from one to three days before the signing of the note. The positive testimony of Mr. Barnes is that, when asked by the president of the association to loan said association money, he told him that he would not loan the fair association anything at all: "That we would not loan it a dollar. But then he said he could get an individual note, and named over certain parties he thought would sign the note, and

asked if he could get the money if those parties would go on the note [mentioning the names of the parties who now appear on the note]. I told him, while we were all there together, if he would get a note signed by those parties individually we would let him have the money. I made out the note myself, and he took it, and afterwards brought it back with those names on there. Q. Did you pay out the money on the note? A. I did." The witness also testified that he knew of the financial condition of the association; that there was a mortgage on its property for \$2,500, and he knew that it would not be a safe investment to loan it money. This witness testifies, besides, that the note was not signed in his office at all, but that it was delivered to the president of the society, who obtained the signatures.

It can be readily gathered from the testimony of the witnesses for the defense that they are not certain where the note was signed. Some of them testified that they thought it was signed in the office of Barnes & McCandless. In fact, there is a mist of uncertainty hanging over their testimony in regard to the whole transaction; just such uncertainty as might be expected where men are relying upon their memories concerning the transaction of several years before, uncertainties which it is the special office of a written agreement to avoid.

There is another circumstance in this case which strengthens the theory of appellants, and that is that certain signers of this note, some years afterwards, when they were pressed for payment, individually agreed each one to pay the one-fourth of this note. This agreement is testified to by Kauffman, a disinterested witness, and is a pertinent circumstance in the case. Again, the form of the note itself indicates that the understanding was as testified to by Barnes. If these parties had intended to sign a note binding the corporation only, they would have signed it as they did, adding after their names, "Trustees of the Agricultural Fair Association." Such a signing as this would simply have been held to have been descriptive of the names of the signers, and would probably not have bound the association; but it would have indicated the intention of the parties to bind the association, and

would have been such a signing as the ordinary citizen, not acquainted with technical law, would have executed. But here the note not only is not signed, "The Agricultural Fair Association, by Packwood et al.," nor "Packwood et al., for the Agricultural Fair Association," nor "Packwood et al., Trustees of the Agricultural Fair Association"; but is signed in such a manner that it indicates that there was no attempt or thought of binding the association in any way. It is true that there occurs in the note this language, "For the use of the Agricultural Fair Association." This is explained by the testimony of Barnes that they told him they wanted that inserted so that it would show where the money went, as the money was actually for use of the fair association, and assisted them in keeping their books with the said association. It is also, no doubt, true that the resolution was passed authorizing these trustees to borrow money for the association. In fact, it is not likely that they would have borrowed it under any circumstances had not such a resolution been passed, and the will of the association been thereby expressed. But, in our judgment, that was all the effect that the resolution had, and from that resolution the trustees felt warranted in borrowing money for the use of the association, and made themselves personally liable for the same, looking to the society for their pay, and relying upon the resolution as authority for borrowing the money. It is true that there are four witnesses who testify here in favor of the contention of the respondents, and only two in favor of that of the appellants. But this, as we have said before, can go no further than a preponderance of the testimony, conceding the witnesses to be all of equal credibility. We think there are no cases sustaining the doctrine that the presumption that a written instrument expresses the true agreement of the parties can be overcome by a mere preponderance of the testimony. The judgment will be reversed, and the cause remanded with instructions to give judgment to the plaintiffs for the amount asked for in the complaint.

SCOTT, ANDERS, STILES, and HOYT, JJ., concur.

THOMAS et al. v. SCUTT.

(27 N. E. 961, 127 N. Y. 133.)

Court of Appeals of New York, Second Division.
June 2, 1891.

Appeal from a judgment of the general term of the supreme court, in the fourth judicial department, affirming a judgment entered on the report of a referee. Action to recover the sum of \$800 alleged by the plaintiffs to be due them from the defendant upon the sale of a quantity of lumber. The defendant denied the purchase, and alleged that all the lumber that he had of the plaintiffs' was turned out to him to secure advances that he had previously made to them, under the express agreement that it should be rafted to market, and sold as his lumber, and that he should account to them for the proceeds thereof when received, after deducting all expenses and the amount of their indebtedness to him. The defendant further alleged that, owing to low water in the Delaware river, the lumber could not be got to market without great expense, necessarily incurred in taking it out of the river and rerafting it, and that the proceeds received by him were much less than the actual expenses and the amount of his claim against the plaintiffs. The action was tried before a referee, who found that June 11, 1883, the lumber in question was sold by the plaintiffs to the defendant for the sum of \$728, which was to be applied by him upon a chattel mortgage given by them upon said lumber and other property to secure a debt of \$1,600, and that soon after the balance of the mortgage was paid in cash. It appeared that the defendant, at about the date of the alleged sale, took possession of the lumber, and, after some delay, sold it; but, owing to the unusual difficulty of getting it to market, little or nothing was realized above expenses.

W. J. Welsh, for appellant. *A. Taylor* and *John B. Gleason*, for respondents.

VANN, J., (after stating the facts as above.) Upon the trial, the plaintiffs put in evidence a written instrument, dated June 11, 1883, duly signed by them, of which the following is a copy, viz.: "For the consideration hereinafter named, we hereby sell, assign, transfer, and deliver to Milo Scutt one raft of hemlock toggle timber, and loading thereon, now lying at Equinunk Eddy, just below the Rock, in Buckingham township, Pa., the said lumber being covered by a chattel mortgage of which the mortgage hereto attached is a copy, viz.:

4,000 feet cherry boards, at \$3.....	\$ 48 00
35,000 maple plank, about, at \$10.....	350 00
11,000 feet of toggle timber, at 3c.....	330 00

\$728 00

—The same to apply on the amount due on said chattel mortgage, and, if any mistake in amount of lumber, same to be corrected." A chattel mortgage was annexed to this writing, dated March 23, 1883, given by the plaintiffs to defendant

to secure the payment of \$1,600 on the first of May following. It covered a large quantity of lumber in addition to that mentioned in the written agreement, and stated that it was all at Peas Eddy, a place within the state of New York. The indebtedness of the plaintiffs to the defendant on the 11th of June, 1883, amounted to the sum of \$2,100, including that secured by the chattel mortgage. The plaintiffs also showed that, shortly after the written instrument was given, they paid to the defendant enough money to fully equal the amount unpaid upon the mortgage, provided said sum of \$728 had first been applied. Thereupon the defendant, in due form, offered to show "what was said between the parties in reference to the bill of sale," but the offer was excluded, upon the ground that the writing was the best evidence, and that it could not be contradicted or avoided by parol. The defendant further sought to prove "that, prior to and at the time of the drawing of the bill of sale, the plaintiffs refused to make an absolute disposition of the lumber; that they were informed that such was not intended, but that the raft was in Pennsylvania, and that the chattel mortgage did not protect defendant against a levy upon or disposition of the lumber by the plaintiffs in that state; that plaintiffs should have the full benefit of the lumber, and what it brought on the sale when marketed, after paying the plaintiffs' claim, and the expense of running and marketing it; that plaintiffs said they were satisfied with that, and would make the bill of sale on this basis, and thereupon did sign the bill of sale." This evidence was also objected to and excluded upon the same ground. At a later stage of the trial the defendant, under the same objection, was permitted to testify in reference to what was said between himself and one of the plaintiffs just before the written instrument, called for convenience a "bill of sale," was executed; but it was subsequently stricken out on motion of the plaintiffs, and against the objection of the defendant, upon the same ground that had governed the prior rulings. Exceptions to these decisions of the referee present the only question that the learned counsel for the defendant has asked us to decide. It is a general rule that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms. This rule is not universal in its application, because the courts, in their effort to prevent fraud and injustice, have laid down certain exceptions, which, although correct in principle, are sometimes so loosely applied in practice as to threaten the integrity of the rule itself. 1 Greenl. Ev. § 244. The real exceptions may be grouped in two classes, the first of which includes those cases in which parol evidence has been received to show that that which purports to be a written contract is in fact no contract at all. Thus, fraud, illegality, want of consideration, delivery upon an unperformed condition, and the like, may be shown by parol, not to contradict or

vary, but to destroy, a written instrument. Such proof does not recognize the contract as ever existing as a valid agreement, and is received, from the necessity of the case, to show that that which appears to be is not, and never was, a contract. Illustrations of this class may be found in the following citations: *Beecker v. Vrooman*, 13 Johns. 301; *Hammond v. Hopping*, 13 Wend. 505; *Johnson v. Miln*, 14 Wend. 195; *Benton v. Martin*, 52 N. Y. 570; *Grierson v. Mason*, 60 N. Y. 394; 1 Greenl. Ev. § 284; *Phil. Ev.* (2 Cow. & H. notes) p. 665, note 494. The second class embraces those cases which recognize the written instrument as existing and valid, but regard it as incomplete, either obviously, or at least possibly, and admit parol evidence, not to contradict or vary, but to complete, the entire agreement, of which the writing is only a part. Receipts, bills of parcels, and writings that evidently express only some parts of the agreement, are examples of this class, which leaves the written contract unchanged, but treats it as a part of an entire oral agreement, the remainder of which was not reduced to writing. Two things however, are essential to bring a case within this class: (1) The writing must not appear, upon inspection, to be a complete contract, embracing all the particulars necessary to make a perfect agreement, and designed to express the whole arrangement between the parties, for in such a case it is conclusively presumed to embrace the entire contract. (2) The parol evidence must be consistent with, and not contradictory of, the written instrument. *Chapin v. Dobson*, 78 N. Y. 74, is an instance of this class, and, although near the border line, illustrates the two requirements just mentioned. In that case it was held competent to show by parol evidence that a written contract to furnish machinery of a specified kind, at a definite price, within a certain time, and to deliver it in a particular way, was part of an entire verbal contract, which provided that the machines should be so made that they would do the work of the person who ordered them to his satisfaction. The ground of the decision was that there was nothing on the face of the instrument to show that it was the whole agreement between the parties, and that the oral guaranty did not contradict and was not inconsistent with the written contract.

In *Eighmie v. Taylor*, 98 N. Y. 288, the court had under consideration a written instrument that was regarded as, upon inspection, appearing to be a full, definite, and complete agreement of bargain and sale, and therefore held that evidence of a verbal warranty in that case was inadmissible. In the course of the opinion, comment was made upon *Chapin v. Dobson*, supra, in this way: "It was said of the instrument then in question that there was nothing upon its face to show that it was intended to express the whole contract between the parties; the inference being, as was declared in an earlier case, that where a contract does indicate such intention and design, and is one consummated by the writing, the presump-

tion of law arises that the written instrument contains the whole of the agreement, and that, where there is such formal contract of bargain and sale executed in writing, there can be no question but that the parties intended the writing as a repository of the agreement itself;" citing *Filkins v. Whyland*, 24 N. Y. 338. A further illustration of the inflexibility of the first of the two requirements mentioned may be seen in the still later case of *Marsh v. McNair*, 99 N. Y. 174, 1 N. E. Rep. 660, where the written instrument was in these words: "This is to certify that, in consideration of crediting C. H. Marsh at the Exchange Bank of Lima, \$353.72, paying mortgage (on property formerly deeded by J. R. Marsh, in Avon, to C. W. Gibson) given by William F. Russell to C. H. Marsh, \$110.46, and indorsing \$35.82 upon a note made by C. H. Marsh, June 8, 1871, for \$300, we jointly and severally sell, assign, and transfer all our right title, and interest in two policies, Nos. 4,277 and 4,287, upon the lives of Charles H. Marsh and John R. Marsh, issued by the National Life Insurance Company of the United States of America to Chauncey W. Gibson, of Lima, N. Y." It was held that, in the absence of any claim of fraud or mutual mistake as to the contents of the assignment, it was conclusive, and that oral evidence was incompetent to show that it was executed as collateral security only. The opinion recognizes as well settled that an instrument assigning or conveying real or personal property in absolute terms may, by parol evidence, be shown to have been intended as security merely; states the history of the exception, and its theory; but declares, in words applicable to the case in hand, that "this instrument is more than an assignment. It contains what both parties agreed to do. It shows that the assignment was made for the purpose mentioned, and precisely what Gibson was to do in consideration thereof. He became bound to do precisely what was specified for him to do, and he could have been sued by the assignors for damages if he had failed to perform. Hence the instrument is not a mere assignment or transfer of the policy. It is a contract in writing, within the rule which prohibits parol evidence to explain, vary, or contradict such contracts." The authorities cited in the opinion apply with equal force to the case now under consideration.

The principle upon which parol evidence is held admissible to show that a simple assignment, although absolute in terms, was intended as security merely is the supposed incompleteness of the instrument, and it is not regarded as contradicting the writing, but as showing its purpose. *Truscott v. King*, 6 N. Y. 147, 161; *Chester v. Bank*, 16 N. Y. 336, 343; *Horn v. Keteltas*, 46 N. Y. 605, 610. Where, however, instead of a mere transfer or assignment, there is a contract, appearing on its face to be complete, with mutual obligations to be performed, "you can no more add to or contradict its legal effect by parol stipulations, preceding or accompanying its execution, than you can alter it, through the same means, in any other re-

spect." *Phil. Ev.* (2 Cowen & H. notes.) 668; *Renard v. Sampson*, 12 N. Y. 561; *Shaw v. Insurance Co.*, 69 N. Y. 286; *Long v. Iron Co.*, 101 N. Y. 638, 4 N. E. Rep. 735; *Snowden v. Guion*, 101 N. Y. 458, 5 N. E. Rep. 322; *Gordon v. Niemann*, 118 N. Y. 153, 23 N. E. Rep. 454; *Humphreys v. Railroad Co.*, 121 N. Y. 435, 24 N. E. Rep. 695; *Engelhorn v. Reitlinger*, 122 N. Y. 76, 25 N. E. Rep. 297. In the foregoing classification collateral agreements are not included, because they are separate, independent, and complete contracts, although relating to the same subject. They are allowed to be proved by parol, because they were made by parol, and no part thereof committed to writing. Evidence to explain ambiguity, establish a custom, or show the meaning of technical terms, and the like, is not regarded as an exception to the general rule, because it does not contradict or vary the written instrument, but simply places the court in the position of the parties when they made the contract, and enables it to appreciate the force of the words they used in reducing it to writing. It is received where doubt arises upon the face of the instrument as to its meaning, not to enable the court to hear what the parties said, but to enable it to understand what they wrote, as they understood it at the time. Such evidence is explanatory, and must be inconsistent with the terms of the contract. *Dana v. Fiedler*, 12 N. Y. 40; *Collender v. Dinsmore*, 55 N. Y. 200; *Newhall v. Appleton*, 114 N. Y. 140, 21 N. E. Rep. 105; *Smith v. Clews*, 114 N. Y. 190, 21 N. E. Rep. 160.

Returning, now, to the written instrument executed by the plaintiffs in this case, and it appears, upon analyzing its provisions, to be an agreement of a complete and comprehensive character. There is, first, a transfer in formal terms by the plaintiffs to the defendant of a draft of hemlock lumber lying at a place named, followed by the statement that such lumber is covered by the chattel mortgage annexed. Three different kinds of lumber are then enumerated, with the quantity in feet of each, the price per foot or per thousand, and the amount that each kind comes to at the price named. Those sums are added, and the amount thereof, constituting the purchase price, the defendant expressly agrees to apply on his chattel mortgage, and both parties agree to correct any mistake there may be in the amount of the lumber. The method of correcting mistakes is not provided, but it is clear that, if the lumber overran the amount stated, the plaintiffs were to have the benefit of it, while, if it fell short, the

defendant was to have the deficiency made good to him in some way. We regard this contract as complete upon its face. What element is wanting? If such a writing can be undermined by parol evidence, what written instrument is safe? How can a man, however prudent, protect himself against perjury, infirmity of memory, or the death of witnesses? What stipulation was omitted that should have been inserted in order to bring the instrument within the general rule? What will be left of the rule if it is established that it does not control such a contract? Will anything of value be left, if it is held that a writing which contains the full and definite terms of a contract, apparently complete, may be shown by parol evidence to be simply part performance of an entire verbal agreement previously made? We think that the writing in question is governed by the rule, not by the exception. As was said by this court in *Eighmie v. Taylor*, supra, 296, it contains a definite agreement of bargain and sale, specifies the consideration, describes the subject, contains mutual covenants for the protection of each party, and leaves nothing of a complete, perfect, and consummated agreement to be supplied. On its face, "no element is wanting of an entire contract, exhausting the final intentions of both parties. It is therefore such a paper as falls within the protection of the rule, and must be conclusively presumed to contain the whole contract as made." Moreover, aside from the presumption arising from an inspection of the paper, such a parol arrangement as the defendant tried to prove would be inconsistent with the written instrument, because the purchase price was not according to the former, to be applied as provided in the latter. Indeed, it would be taken bodily out of the writing, and an arrangement of a different and inconsistent character substituted. Besides, the agreement that any mistake in the amount of the lumber should be corrected, while consistent with an absolute sale, is inconsistent with a transfer, for the purpose of securing a debt. We think that the writing in question imports on its face a complete expression of what the parties agreed to, and hence that it is conclusively presumed to contain all that they agreed to. We are further of the opinion that the parol evidence sought to be introduced was inconsistent with and contradictory of the written agreement, and was hence inadmissible on that ground also. It follows that the rulings of the referee were correct, and that the judgment should be affirmed. All concur.

STATE (CUMMINGS, Prosecutor) v. CASE.
(18 Atl. 972, 52 N. J. Law, 77.)

Supreme Court of New Jersey. Dec. 28, 1889.

Certiorari to court of common pleas, Essex county.

Argued June term, 1888, before SCUDDER and REED, JJ.

Franklin M. Olds, for plaintiff in *certiorari*. *Robert H. McCarter*, for defendant.

REED, J. Catharine E. Case brought an action against Samuel Cummings, Jr., in the second district court of Newark, for the recovery of the sum of \$125, the price which she had paid for a horse purchased by her of Cummings. The *gravamen* of the demand of the plaintiff was that such sale was brought about by the fraudulent representation of the defendant, which fraudulent conduct conferred upon her the right of rescission, and that, in the exercise of such right, she tendered back the animal, and demanded a return of the consideration paid, and that the defendant refused to comply with such demand. The case was tried before a jury; and, under the law, as charged by the court, the jury found the facts to be such as to entitle the plaintiff to a verdict for the full amount paid. The judgment entered upon this verdict was taken to the Sussex county common pleas, and there affirmed. That judgment is brought up by the present writ.

The representations, the falsity of which constituted the ground of the verdict against the defendant, appears, by the state of the case agreed upon by the attorneys, to have been made as follows: One Van Buskirk, as the agent of the plaintiff, inquired of defendant about a certain brown horse owned by defendant. Van Buskirk asked if the brown horse could travel seven or eight miles an hour, and stated that a horse that could do that was required. The defendant said that the brown horse was too slow for that purpose, but pointed Van Buskirk to a gray horse, stating that he could easily go seven or eight miles an hour, as it had formerly been a very fast horse, and attached to the salvage corps wagon, but that, meeting with an accident one day, while going to a fire, it had injured one leg a little, making it unfit for the work required of it by the salvage corps. On another occasion, Mr. Cass, in the presence of his wife, the plaintiff, stated to defendant that they desired a horse that could make the distance between Roseland and Orange Valley, between seven and eight miles, in one hour, or one and a half hours, and stated that, if the horse could not do that, they did not want to buy him; to which defendant replied that the horse could easily do that. Plaintiff sought to try the horse by driving him one evening; but the defendant refused to allow said trial, stating that the horse had already, on that day, been to Harlem and Orange, which statement was true. The next morning plaintiff purchased the horse for \$125, paid \$50 in cash, and gave a

promissory note of four months, indorsed by Mr. Van Buskirk. There was evidence that the horse was not able to travel seven or eight miles in one hour, or in one hour and a half, and was not fit for the purpose for which he had been bought. It appeared on the cross-examination of the plaintiff that at the time of the sale a written warranty of the horse had been given, in the following form: "Newark, April 6th, 1887. To one gray horse, Charley, which I warrant to be sound and kind, with the exception of straining of muscle of left hind leg." The counsel for defendant thereupon moved that all evidence as to representations made by the defendant, other than those contained in the written warranty, be stricken out, on the ground that, the agreement of the parties having been reduced to writing, such writing could not be varied or enlarged by parol evidence. The court denied the motion, and allowed an exception. When the plaintiff rested his case, the counsel for defendant moved for a nonsuit, upon the ground that, a written warranty having been proved to have been given on the sale of the horse, and there being no evidence that the horse did not correspond with this warranty, the plaintiff had not made out any case for damages. This motion was denied, and an exception was allowed. At the close of the summing up of counsel, the counsel for the defendant requested the court to charge the jury that, there being no warranty, the jury cannot consider any testimony as to any representation not contained therein. This request was refused, and an exception allowed. The court charged the jury that if they believed that the representations alleged to have been made in relation to the speed of the horse were made, and that the plaintiff, relying upon them, purchased the horse, and that such representations were in fact not true, and the horse was therefore unfit for the purpose for which it was bought, that plaintiff could recover the purchase money, she having offered to return the horse, on the ground of fraud or deceit, which was independent and irrespective of the so-called warranty. To this portion of the charge an exception was allowed. The counsel for the defendant also requested the court to charge that, if the jury should find for the plaintiff, the measure of damages must be the difference in value between what the horse was actually worth in the condition he was in at the time of the sale and what he would have been worth if the representations made by the defendant had been true; which request the court refused to charge, and allowed an exception. The court, to the contrary, charged the jury that if they found for the plaintiff they must find in the sum of \$125, that being the price she had paid for the horse. An exception was allowed to this part of the charge. Reasons covering the above exceptions were assigned for the reversal of the judgment below.

The primary question raised by the exceptions, and argued with elaborate care, is one

of evidence. It involves the correctness of the judicial ruling by which the testimony in respect to certain representations made by the vendor previous to, and at the time of, the sale, were admitted in evidence. These representations, as already appears, were made in respect to the traveling qualities of the animal sold. It also appears that there was a written warranty in respect to the quality of soundness and quietness. It is insisted by the counsel for the defendant below that the admission of the verbal representations enlarged and varied the written contract. He therefore invokes the inexorable rule of evidence that, when parties have put their contract into writing, oral testimony cannot be substituted for, or added to, the written evidence of the agreement. 1 Greenl. Ev. § 88. This principle has, from the earliest period of jurisprudence, been recognized as a wholesome and necessary rule of public policy. *Id.* § 275; *Wright v. Remington*, 41 N. J. Law, 48, 43 N. J. Law, 451; *Naumberg v. Young*, 44 N. J. Law, 331. But this rule of evidence is not infringed by the admission of parol testimony which is not intended as a substitution for, or an addition to, a written contract, but which goes to show that the instrument is void or voidable, and that it never had any legal existence, or binding force, either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject-matter of the contract. 1 Greenl. Ev. § 284. Nor is the admission of parol evidence for the purpose of avoiding a written contract on the ground of fraud confined to such testimony as goes to show that a party was lured to make a contract other than that intended, as by the substitution of one contract for another by trickery, or by misreading a contract to an illiterate person. Parol testimony may be admitted to show that the execution of a written contract was brought about by a fraudulent representation. The force given to a seal, which formerly excluded testimony in respect to the failure of consideration in a specialty, is now abolished by legislation. So that the rule above stated, respecting the admissibility of fraudulent representation, is now applicable to all contracts. The elements essential to constitute such fraudulent representation will be considered later; and it is now necessary only to remark that such evidence as will lay a foundation for an action of deceit, or a ground for the rescission of the contract, is always receivable, although it consists of oral representations. This point was strenuously denied in the arguments submitted by the counsel for the defendant. His contention was that fraud in the execution of the instrument could be shown, but that oral representations, going to a failure of consideration only, could not. The seeming strength of his contention lay in the likeness between the written and the oral facts in the present case, both concerning the quality of the animal sold. The written warranty applied to the soundness

and kindness of the horse, and the oral testimony to the speed of the animal. The danger of permitting parol declarations to be proved which were so nearly related to the subject-matter of the written warranty was strongly pressed as an evil which the rule of evidence already stated seemed especially designed to prevent. But the distinction between such representations as add to the contract and such as avoid the contract, because of their fraudulent character, is too firmly established in our jurisprudence to be now shaken. As an additional warranty, that is, as an addition to the contract, the present representations were clearly inadmissible. So soon, however, as they displayed such features as went to show that through them the contract had been fraudulently induced, and so was unenforceable, for that reason, at the election of the defrauded party, the rule excluding parol testimony to enlarge a written contract became inoperative. It is, of course, obvious that the fact that there was a written warranty in respect to the soundness and kindness of the animal would be a forcible argument that no other representations as to quality were made. The existence of the written warranty would be useful in determining the probability of the truth of the counter-statements of the parties as to the existence or non-existence of the parol declaration; but when the fraudulent affirmation is once proven to exist the written contract becomes unimportant. This seems to be an elementary principle of the law of evidence. The right to prove fraud, in whatever shape it may exist, to avoid written contracts, has been so uniformly recognized that it can hardly be said to have been the subject of serious judicial discussion. The power to consider parol evidence, in regard to its effects upon contracts in respect to the question of fraud, has been passed over *sub silentio*, and the courts have gone on to consider the probative force of the testimony. No case was discovered by the industry of counsel which excluded such testimony, and all the cases in which judges have touched upon the subject have assumed the admissibility of testimony setting up fraudulent representations to avoid a written contract. *Dobell v. Stevens*, 3 Barn. & C. 623; *Hutson v. Browne*, 9 C. B. (N. S.) 442; *Steward v. Coesvelt*, 1 Car. & P. 23; *Koop v. Handy*, 41 Barb. 454; *Pren-tiss v. Russ*, 16 Me. 30; *Van Buskirk v. Day*, 32 Ill. 260; *Eaton v. Eaton*, 35 N. J. Law, 290. I conclude, therefore, that if the evidence established fraudulent conduct on the part of the defendant the testimony was properly admitted.

This conclusion leads to the consideration of the testimony received and submitted to the jury. This consideration involves two questions: *First*. Was the testimony properly submitted to the jury at all? *Second*. If so, was it submitted under proper instructions? As already remarked, the admissibility of the testimony, and therefore its submission to the jury, depends for its sanction upon the ques-

tion whether it was sufficient, in any aspect in which the jury might view it, to establish fraud. The general character of a fraudulent representation which will lay a foundation for an action for deceit, or a ground for a defense against a counter-action upon a contract, or a basis for the rescission of a contract, are well settled, so far as general rules can settle any legal question. The representation must be concerning a material fact, must induce to the execution of the contract, and must be made falsely. The falsity constitutes the *scienter*, which is an essential element in every fraudulent representation. This falsity may consist in making a representation of a material fact, knowing it to be false; or it may consist in making a representation which is untrue, without knowledge whether it is true or false, and by coupling with the representation an expressed or implied affirmation that it is known to be true, of personal knowledge. The instances in which representations can be said to be fraudulent, as they are cognizable in a court of law, are confined within the limits of the above statement. The case of *Bennett v. Judson*, 21 N. Y. 238, which attempted to extend the limits of this rule beyond that stated, and import into it the equitable doctrine laid down by Judge Story, has been repudiated by subsequent cases in the courts of that state, (*Oberlander v. Spiess*, 45 N. Y. 175; *Stitt v. Little*, 63 N. Y. 427; *Wakeman v. Dalley*, 51 N. Y. 27;) and this is the rule of the common-law courts of England and Massachusetts, and our own state, as shown by Mr. Justice DEPUE in the case of *Cowley v. Smyth*, 46 N. J. Law, 380. The *scienter*, therefore, must be proved in one or the other of these shapes. In the present case, it was not proven in the first shape; for proof of a knowledge of the falsity of the statement on the part of a vendor of the horse was not attempted, nor was the question submitted to the jury. The question arises, therefore, whether a *scienter* appears in the second possible shape. It does not appear that the defendant expressly stated that the facts affirmed were true, of his own knowledge. In examining the cases, however, we discover that an express affirmance of personal knowledge is not always requisite, as such affirmance may be implied. Nor, on the other hand, does it appear that an express affirmance of personal knowledge is to be taken as fixing conclusively the defendant's liability; for it may be so qualified by the facts stated as to convey a modified impression. Indeed, the test seems to consist not so much in the absence or presence of an expressed assertion of personal knowledge as in the character of the facts alleged to be true. The rule of discrimination stated by Mr. Justice DEPUE in *Cowley v. Smyth*, 46 N. J. Law, 380, is this: "If the party adds to a representation an affirmation that he made the representation as of his own knowledge, the force and effect of the evidence will depend in a great measure upon the nature of the subject concerning which the representation was made.

If it be with respect to a specific fact, or facts susceptible of exact knowledge, and the subject-matter be such as that the affirmation of knowledge is to be taken in its strict sense, and not merely as a strong expression of belief, the falsehood in such a representation lies in the defendant's affirmation that he had the requisite knowledge to vouch for the truth of his assertions, and that, being untrue, the falsehood would be willful, and therefore fraudulent. But, where the representation is concerning a condition of affairs not susceptible of exact knowledge, * * * the assertion of knowledge is to be taken *secundum subjectam materiam*, as meaning no other than a strong belief founded upon what appeared to the defendant to be reasonable and certain grounds." Therefore, without regard to whether the affirmance of personal knowledge was express or otherwise, the existence of such affirmation depends upon the form of the affirmation of fact, and of the character of subject-matter, concerning which the affirmation was made. From these circumstances, it must be considered, in the language used in *Marsh v. Falker*, 40 N. Y. 562, whether the party assumed, or intended to convey the impression, that he had actual knowledge, though conscious that he had not. In the following cases there was no express affirmance of personal knowledge: *Harvard v. Irwin*, 18 Pick. 95; *Milliken v. Thorndike*, 103 Mass. 382; *Litchfield v. Hutchinson*, 117 Mass. 195; *Wakeman v. Dalley*, 51 N. Y. 27.

The question whether there is an affirmation of personal knowledge is sometimes one of law, but oftener one of fact. In the line of cases of which *Cowley v. Smyth* is a sample, it is treated as a question of law, arising from the character of the facts which were the subject-matter of the representations. It was legally concluded that the representations could only be those of belief. On the other hand, there might be express affirmance of personal knowledge with respect to facts so obviously the subject of accurate knowledge that it could be legally concluded that it was not an expression of belief or opinion, and that, therefore, the falsity of the facts stated would imply a *scienter*. In a wide range of cases the question of the existence of an affirmation of personal knowledge was submitted as one of fact, and it was either in support or reversal of the finding of juries or reports of referees that the legal rules applicable to such representations were laid down. This will be observed by reference to the following cases: *Tucker v. White*, 125 Mass. 344; *Milliken v. Thorndike*, 103 Mass. 382; *Page v. Bent*, 2 Mete. 371; and cases already cited upon the preceding points. In the present case, it appears, to my mind, clear that it could not be legally inferred that there was an assertion of personal knowledge of the truth of the facts stated. The whole conversation between vendor and purchaser suggests the opposite. It implied that the vendor's knowledge of the traveling ability of the horse

rested upon what he knew of the previous history of the animal, and perhaps, in some degree, from the use of a horse by other persons. The animal seems to have been used for livery purposes. The horse had been admittedly driven to Orange and Harlem the day before the sale was consummated. The vendor did not say that he had driven the horse the alleged distance in the time stated. He does not say he had driven him at all. His statement that the horse could easily do that, for he had been a very fast horse, and had been used to the salvage corps wagon, implied that his knowledge was grounded upon such information, rather than upon personal knowledge. Therefore it seems to me that it was clearly a mistake for the court to say that the representation was so obviously of a fact susceptible of exact information, made as of the personal knowledge of the vendor, that this question was not one to be left to the jury. It also seems to me that the representations, as they appear in the case, and as they were treated at the trial, amounted to something more than an affirmation that the horse was able to travel the distance named within the time mentioned on a single occasion, but they implied that the animal could habitually do so. The idea conveyed was that the horse was to be fit for the service required, namely, to convey the purchaser from Rockland to Orange Valley, in the course of his business. This seems to involve the question of the horse's ability to perform that service continually. Now, it seems apparent that when the representation not only covers the present ability to perform a service once, but also its ability to do so frequently and continuously, it extends beyond the realm of exact information, if it does not cease to be a representation of a subsisting fact at all, and become a mere promise for future performance. But, without regarding this feature of the case, I am convinced that, in assum-

ing that the present case was one in which the falsity of the representation raised the legal inference of fraud, the court was in error. The case of *Searing v. Lum*, 5 N. J. Law, 785, was an action for deceit, brought in a justice's court, upon the ground of false representations in the sale of a horse. The *gravamen* of the action was that the vendor had represented the horse to be so and kind. The justice charged that it was unnecessary to prove that the defendant had any knowledge of the unkindness of the horse. The court above held this to be error. The case of *Allen v. Wanamaker*, 31 N. J. Law, 370, was an action for false representations, in that the defendant represented certain peach trees to be good. The court charged that the defendant was liable for such representations, if false, whether he knew them to be true or not. This was held error. I, however, incline to the opinion that in this case the question whether there was an affirmation of personal knowledge of the truth of the representation was not one for the jury; but I think that this is so because the representations were of a kind concerning which the judge could say it was legally inferable that they were the statement of a strong belief only in the truth of the facts asserted. The feature of the case already mentioned, which led me to the conclusion that the assumption of the trial judge was a mistake, leads me to the opposite conclusion, that the legal inference to be drawn is that it would not have been understood by the vendor and the vendee, at the time of the sale, that there was coupled with the representations concerning the horse a representation that the vendor had personal knowledge concerning them, but that it was understood that he expressed his strong belief in their truth, resting upon his knowledge of the previous history of the animal, and his use as a livery horse. For these reasons, I think the judgment below should be reversed.

DURKIN v. COBLEIGH.

(30 N. E. 474, 156 Mass. 108.)

Supreme Judicial Court of Massachusetts. Suffolk. Feb. 27, 1892.

Exceptions from superior court, Suffolk county; James M. Barker, Judge.

Action by Patrick Durkin against Benj. F. Cobleigh for breach of agreement. A verdict was rendered for defendant by direction of the court, and plaintiff excepts. Exceptions sustained.

F. W. Kittredge and W. H. Drury, for plaintiff. F. Hutchinson, for defendant.

ALLEN, J. This is an action of contract. The plaintiff had taken from the defendant a deed of land described as bounded on a street, and referring to a plan on which the street was shown. This street was upon land owned by the defendant. The deed contained no covenant that the defendant would build the street, or cause water to be introduced therein. The plaintiff's case rests upon the proposition that, in order to induce him to buy the lot, the defendant orally promised to grade and build the street so as to connect with a certain public street already built and open, and also to cause the city water to be put into the street by a certain specified time. The question is whether such an oral agreement may be shown. The plaintiff gained a right of way by estoppel over the land owned by the defendant, and described as a street. *Howe v. Alger*, 4 Allen, 206; *Insurance Co. v. Cousens*, 127 Mass. 258; *Crowell v. Beverly*, 134 Mass. 98. And this right would extend for the entire length of the street, as indicated, provided the defendant owned the same. *Tobey v. Taunton*, 119 Mass. 404; *Fox v. Sugar Refinery*, 109 Mass. 292. But the defendant would not be bound by his deed to build and maintain the street fit to travel. *Hennessey v. Railroad Co.*, 101 Mass. 540. The obligation of the defendant to do the acts now in question depends wholly on his alleged oral agreement. A rule has been established which may be stated in general terms to be that an agreement by parol, which is collateral to the written contract and on a distinct subject, may be proved. It is rather difficult to lay down a precise formula to define in advance for all cases what will come within this rule. In *Steph. Dig. Ev.* (Am. Ed.) 163, this is attempted as follows: "The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them," may be proved. Where the oral agreement is on the face of it incon-

sistent with what was written, it is plain that the writing must prevail. *Flynn v. Bourneuf*, 143 Mass. 277, 9 N. E. 650, and *Knowlton v. Keenan*, 146 Mass. 86, 15 N. E. 127, were cases of this kind. But the more difficult question arises where the oral agreement relied on relates to something not specified in terms in the writing. It must then be determined whether the written document is to be deemed to contain all that was agreed between the parties. There are many cases in which this question has been presented, and the decisions are not entirely harmonious. Thus in *Naumberg v. Young*, 44 N. J. Law, 331, the court disapproved of the decisions in *Morgan v. Griffith*, L. R. 6 Exch. 70, and *Erschine v. Adeane*, 8 Ch. App. 756, in which cases it was held that an oral agreement by a lessor to destroy the rabbits might be proved. In an early Massachusetts case it was held that a lessor is not bound by an oral agreement to provide other and better accommodations than those stipulated for in the lease. *Brigham v. Rogers*, 17 Mass. 571. And on a written contract of sale of goods an additional warranty cannot be proved by parol. *Whitmore v. Iron Co.*, 2 Allen, 52, 58; *Eighmie v. Taylor*, 98 N. Y. 288. So where one, by a written instrument, agreed to sell out his business stand and stock of goods, it cannot be shown by parol that he also agreed not to engage in a similar business in the same town. *Doyle v. Dixon*, 12 Allen, 576; *Wilson v. Sherburne*, 6 Cush. 68. On the other hand, in several cases more nearly resembling the present in their facts, it has been held that an additional oral agreement might be proved. Thus oral agreements by vendors of land requiring to be filled, that they would pay for the filling, have been held to be independent collateral agreements which might be enforced. *Page v. Monks*, 5 Gray, 492; *McCormich v. Cheevers*, 124 Mass. 262. Also an oral agreement by a grantor to pay for building a sewer in the street. *Carr v. Dooley*, 119 Mass. 294. The case of *Graffam v. Pierce*, 143 Mass. 386, 9 N. E. 819, was deemed to come within the same doctrine. It was determined in *Ayer v. Manufacturing Co.*, 147 Mass. 46, 16 N. E. 754, that a manufacturer of goods who accepted a written order, with stipulations as to quality, price, and rebate or claims for allowance, might be held on an oral agreement to advertise the goods. See, also, *Willis v. Hulbert*, 117 Mass. 151; *Rennell v. Kimball*, 5 Allen, 356; *Tayl. Ev.* §§ 1135, 1147. It seems to us that the case falls within the last class of decisions, and that the alleged agreement of the defendant should be treated as an independent collateral agreement, which need not be included in the deed. The result is that the plaintiff was entitled to have his case submitted to the jury. Exceptions sustained.

GILBERT et al. v. McGINNIS et al.

(28 N. E. 382, 114 Ill. 28.)

Supreme Court of Illinois. May 15, 1885.

Appeal from appellate court, Second district; GEORGE W. STIEP, Judge.

Action by Herbert S. Gilbert & Co. against Patrick McGinnis and others to recover on a contract for the non-delivery of corn. There was a judgment for defendants in the circuit court, which was affirmed in the appellate court, and plaintiffs appeal. The judgment is again affirmed.

Bull, Strawn & Ruger, for appellants.
Duncan & O'Connor, for appellees.

MULKEY, J. On the 16th of February, 1881, Patrick McGinnis, the appellee, sold to the appellants, Herbert S. Gilbert & Co., 7,000 bushels of corn, at 39 cents per bushel, to be delivered in the months of August and September following. As a part of the same agreement, the appellants promised to make advances on the contract to appellee of what money he might, from time to time, require. A short time after the making of this agreement, appellee called on the appellants, at their business house in Ottawa, and requested an advance on the contract, as per agreement. The clerk in charge of their business told him he could have the money, and commenced writing a note for the amount, whereupon appellee stated to the clerk he would not sign a note, remarking, in effect, that if he wanted to obtain money in that way he could get it from the bank. Appellants refused to make the required advance unless appellee would give his note for the amount. This he declined to do, and informed the clerk at the time he would not let appellants have the corn. The corn not having been delivered within the time specified in the agreement, the appellants, on the 3d day of October, 1881, commenced an action of *assumpsit* against appellee, in the circuit court of La Salle county, to recover damages for the non-delivery of the corn, which resulted in a judgment in favor of the defendant for costs. This judgment having been affirmed by the appellate court for the second district, the plaintiffs appealed to this court.

On the trial the plaintiffs offered to show there was a general custom among grain merchants to take notes from the seller for the amount of advances made under contracts for the sale of grain, like the one in question. They also proposed to prove that on previous occasions there had been contracts and dealings similar in character to the one sued upon, and that the manner of dealing between the parties was, when an advance was made, memoranda or notes should be taken for the money advanced. The court declined to admit evidence to the jury in support of either of these positions, and the ruling of the court in this respect presents the only question for determination. The same question is raised by certain refused instructions asked on behalf of the appellants. The rule is well recognized that where a commercial contract is in any

respect ambiguous, a particular custom or usage of trade known to the parties, or which, under the circumstances, they are presumed to know, or any previous course of dealing between them that will have a tendency to disclose the real intentions of the parties, and to aid the court in arriving at its true construction, will be admissible in evidence. Such evidence is not only admissible for the purpose of explaining the terms of a contract, but also for the purpose of ingrafting, as it were, new terms into it, subject, however, to the qualification that such new terms are not expressly or impliedly excluded by the express agreement. 1 Smith, Lead. Cas. *307 et seq. To have this effect, however, the usage must be reasonable, and not in conflict with any general rule of law. *Macy v. Insurance Co.*, 9 Metc. (Mass.) 354. The proof offered in this case was clearly not for the purpose of explaining any ambiguity in the contract, or for the purpose of showing that some particular word or phrase in it is used out of its ordinary signification. No claim of this kind is made. It is conceded by both parties that appellants were to make advances,—that is, let appellee have money, from time to time, as he might need it, under the contract. So far there is no controversy. But appellants contend that a custom or usage prevailed, not adverted to in the express agreement, which required the appellee to give to them his note upon receiving any such advances. The usage here sought to be shown, it is clear, was for the purpose of adding a stipulation on the part of appellee, which, it is conceded, is not found in the express agreement. This, as we have already seen, may sometimes be done; but whether it could be done in this particular case depends upon whether the stipulation thus to be added is inconsistent or in conflict with that part of the agreement which is expressed, and about which there is no controversy. We are clearly of opinion that it is, and that the trial court, therefore, ruled properly in excluding the evidence and in refusing the instructions complained of. An advance or payment of money on a contract of sale, without doubt, is altogether a different thing from that of obtaining money from the purchaser on the seller's own note. The legal effect of the transaction in the first case is to extinguish, *pro tanto*, the seller's claim and the purchaser's corresponding liability. In the second, no part of either is extinguished. Instead of collecting something on his corn, as provided by the agreement, the seller is offered a loan of money on his individual note, which would be a complete change of the legal relations of the parties. Whereas the seller was before a mere creditor of the purchaser, he at once, upon giving such a note, becomes the debtor of the purchaser, and no part of the debt due him on account of the sale is thereby discharged. Thus it is seen the legal effect in the one case is practically the very opposite of what it is in the other, and might in many cases result in the grossest injustice. For instance, had appellee given his note for the required advance, the appellants

might, the next hour thereafter, have transferred it to another for value, and appellee would have been compelled to pay it, whether he ever got a cent for his corn or not. This is apparent. That one will not be permitted to prove a custom or usage the effect of which will be to add to an express agreement a condition or limitation which is repugnant to or inconsistent with the agreement itself, will hardly be questioned. This is not only the universally received doctrine on the subject, but it has been often fully recognized by this court. *Cadwell v. Meek*, 17 Ill. 220; *Bissell v. Ryan*, 23 Ill. 566; *Deshler v. Beers*, 32 Ill. 368; *Wilson v. Bauman*, 80 Ill. 493. In the editor's note to

Wigglesworth v. Dallison, 1 Smith, Lead. Cas. 309, it is said: "Evidence of usage, though sometimes admissible to add to or explain, is never to vary or to contradict, either expressly or by implication, the terms of a written instrument;" citing, in support of the proposition, *Magee v. Atkinson*, 2 Mees. & W. 442; *Adams v. Wordley*, 1 Mees. & W. 374; *Trueman v. Loder*, 11 Adol. & E. 589; and *Yates v. Pym*, 6 Taunt. 446. The rule here stated is equally applicable to a verbal contract, where the terms of it are definitely fixed, as they are in the present case. It follows from what we have said, and the authorities cited, the judgment of the appellate court must be affirmed.

COONROD v. MADDEN.

(25 N. E. 1102, 126 Ind. 197.)

Supreme Court of Indiana. Nov. 25, 1890.

Appeal from circuit court, Knox county ;
GEORGE A. BICKNELL, Special Judge.*George C. Reilly*, for appellant. *Cobb & Cobb*, for appellee.

COFFEY, J. This was a suit by the appellee against the appellant upon a promissory note. Answer, payment. Reply, general denial. Trial by the court. Finding and judgment for the appellee, over a motion for a new trial, for the full amount of the note, with reasonable attorney's fees. The assignment of error calls in question the propriety of the ruling of the circuit court in overruling the motion for a new trial. No brief is filed in the cause on behalf of the appellee, and by reason of that fact we are not informed as to the ground upon which the court made its several rulings in his favor. On the trial of the cause the appellant introduced and read in evidence a certain check executed by him to the appellee, and also testified that such check was given and received in part payment of the note in suit. The appellee, over the objection of the appellant, was permitted by the court to testify that the check was received by him in part payment of another and different note from the one in suit, giving the date and amount of said note, and its rate of interest. He also testified that the appellant had paid the note to him in full, and that it had been surrendered to the appellant. The objection to this evidence, stated by the appellant to the court at the time of its introduction, was that it was secondary, and that the appellee could not give evidence of the contents of such note without first proving its loss, or serving notice upon the appellant to produce it in court, to be used in evidence in the cause. It is undoubtedly the general rule that, before parol evidence can be received of the contents of a written instrument, it must be shown that such instrument is lost or destroyed, or that such instrument is in the hands of the party against whom the evidence is offered; and that, upon proper notice so to do, he has failed to produce the original in court, to be read in evidence. *Smith v. Reed*, 7 Ind. 242; *Mumford v. Thomas*, 10 Ind. 167; *Mapson v. Blair*, 15 Ind. 242; *Bridge Co. v. Applegate*, 13 Ind. 339; *Frazee v. State*, 58 Ind. 8; *McMakin v. Weston*, 64 Ind. 270. But there is a well-defined and well-established exception to this general rule. The general rule has no application where the written instrument is merely collateral to the issue; as where the parol evidence re-

lates to matters distinct from the instrument of writing, although the same fact could be proved or disproved by the writing. *Wood, Pr. Ev.* p. 4. In the case of *Daniel v. Johnson*, 29 Ga. 207, it was held that payment might be proved by parol to have been made in promissory notes, without the production of the notes. The rule is that, where the parol evidence is as near the thing to which the witness testifies as the written evidence, then each is primary. *Whart. Ev.* § 77. The case of *Hewitt v. State*, 121 Ind. 245, 23 N. E. Rep. 83, is analogous in principle to the case under consideration. In that case Hewitt was charged with maliciously killing a dog. The state was permitted to prove by parol that the dog in question had been listed for taxation, over the objection of Hewitt that the tax-list returned by the assessor was the best evidence of that fact. In answer to this objection, this court said: "The substantive fact to be proved was that the dog killed had been listed for taxation, and the rule is that, where parol evidence is as near the fact testified to as the written, then each is primary. The rule which requires the production of written instruments in evidence has no application when the instrument is merely collateral to the issue, and where the fact to be proved relates to a subject distinct from the writing." In this case, had the note upon which the appellee claimed the check read in evidence had been applied been produced in court, the parties would have been as far from the real controversy between them as they were before its production; namely, the question as to whether the check was applied on that note or the note in suit. For this reason, we think the case falls within the exception to the general rule above stated. The plea of payment filed by the appellant was no notice to the appellee that he would insist that the check read in evidence was a payment on the note in suit; and so there was no occasion to serve notice to produce, to be read in evidence, the note on which it was actually applied. To hold that notice must be served in order to authorize evidence of the existence of a written instrument coming collaterally in question like the case before us would result in much inconvenience, and would often result in defeating the ends of justice. It will be observed that the contents of the note which had been paid was immaterial to the controversy, save as it furnished evidence of the existence of a debt to the payment of which the check read in evidence might have been applied. In our opinion, the court did not err in admitting the evidence of which complaint is made. Judgment affirmed.

WHITCOMB et al. v. RODMAN et al.

(40 N. E. 553, 156 Ill. 116.)

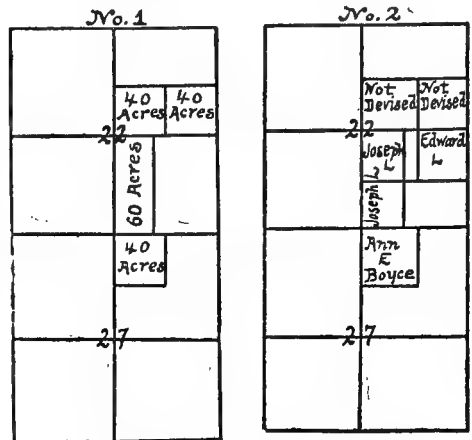
Supreme Court of Illinois. April 2, 1895.

Appeal from circuit court, McLean county;
Owen T. Reeves, Judge.

Bill by Edward L. Rodman and others against Lucinda Whitcomb and others. Complainants obtained a decree. Defendants appeal. Affirmed.

This is a bill brought by Edward L. Rodman, Joseph L. Rodman, and Mary J. Rodman against the heirs and other devisees of John Rodman, deceased, to construe the will of deceased, and to grant title to certain lands alleged to have been devised by the will. John Rodman died testate July 30, 1889. At the time of his death he owned in fee the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 27, 60 acres off of the west side of the S. E. $\frac{1}{4}$ of section 22, the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 22, and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 22, all in township 23 N., range 3 E., in McLean county. He left surviving him Mary Jane Rodman, his widow, and his only heirs at law, his children, Ann Eliza Boyce, Joseph L. Rodman, Edward L. Rodman, Lucinda Whitcomb, and his grandchild, Mary Eveline King, the sole heir and child of his deceased daughter, Mary A. Craig. The will was executed October 17, 1888, and admitted to probate July 19, 1889, and was as follows: "First. I will to my daughter Ann Eliza Boyce forty (40) acres of land, being the northwest quarter of the northeast quarter of section twenty-seven (27). Second. To my son Joseph L. Rodman I will and bequeath one hundred acres of land (100),—sixty acres (60) off of the west side of the southeast quarter of section twenty-two (22), forty acres (40) being the northwest quarter of the southeast quarter of section twenty-two (22). Third. To my son Edward L. Rodman I will and bequeath forty acres of land, being the northeast quarter of the southeast quarter of section twenty-two (22). Fourth. I give to my daughter Lucinda Whitcomb two thousand dollars (\$2,000). Fifth. To my granddaughter, Mary Eveline King, I give two hundred dollars (\$200). The above legacies to be paid out of moneys and credits on hand, and proceeds of the sale of personal property. All of the above land being in town twenty-three (23) north, range three (3) east of the third principal meridian." The will contained a sixth clause, in which certain personal property was devised to the widow, and she was also given the control of the above-described lands during her life. It will be observed that the two 40-acre tracts (S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ section 22 and S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ section 22) owned by the testator are not mentioned in the will, and that the testator never owned the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ section 22, which is devised to Edward L. Rodman, and that the 40 acres devised to Joseph L. Rodman laps into the 60 acres devised to him, and includes

within it the north 30 acres of the 60 acres, and that he did not own the east 10 acres of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, which is devised to Joseph. The situation will be better understood by the following plats of the land; No. 1 being the land owned by the testator, and No. 2 that specifically named in the will:



The testator, when he executed the will, and at the time of his death, was in possession of the lands owned by him. He owned no other lands. The bill prayed for a construction of the will, and that the lands be held to have vested under the will, the S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 22 in Edward L. Rodman, and the S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ in Joseph Rodman, and that the widow be held to have a life estate in all the lands. The answer practically admitted the facts set up in the bill, but denied that it was the intention of the testator to devise the two 40-acre tracts in the N. E. $\frac{1}{4}$ of section 22, or that the will was capable of construction, and claimed that said lands descended as intestate estate. The court, on the hearing, decreed substantially as prayed for in the bill.

Kerrick, Lucas & Spencer, for appellants.
Benjamin & Morrissey, for appellees.

CRAIG, J. (after stating the facts). In the construction of a will the important question, always, is to ascertain the intention of the testator. As was well said by Chief Justice Marshall in *Finlay v. King's Lessee*, 3 Pet. 346: "The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although, in giving effect to it, some words should be rejected, or so restrained in their application as materially to change the literal meaning of the particular sentence." See, also, *Decker v. Decker*, 121 Ill. 354, 12 N. E. 750. It will be presumed that a person, when he makes and publishes a will, intends to dispose of his whole estate, unless the presumption is rebutted by its provisions, or

evidence to the contrary. *Higgins v. Dwen*, 100 Ill. 556; *Society v. Mead*, 131 Ill. 358, 23 N. E. 603; 2 Redf. Wills, 35. Upon an examination of the will in this case, nothing will be found tending in the least to establish an intention on the part of the testator to leave any portion of his property to descend as intestate estate. On the other hand, in view of the property owned by the testator, it is manifest from the language of the will that the testator intended to devise his entire estate. When the will was executed, and at the time of the testator's death, he owned 180 acres of land, and no more. Of this the testator, as is manifest from the will, attempted to devise 100 acres to his son Joseph, 40 acres to his son Edward, and 40 acres to his daughter Ann Eliza Boyce, making 180 acres,—all the land possessed by the testator. But, while it is manifest that the testator intended to dispose of all the lands he possessed, yet the language of the will, as found in the second and third clauses, if construed literally as written, will defeat the plain intention of the testator. Shall that be done, or shall resort be had to extrinsic evidence to ascertain the real intent of the testator? In the consideration of a question of this character, in *Decker v. Decker*, supra, it was held: "While the general rule is that the intention of the testator is to be gathered from an inspection and consideration of the will, and from no other source, yet, in case of latent ambiguity, courts do and must listen to extrinsic evidence, not for the purpose of contradicting or adding to the terms of the will, but for the purpose of determining the existence or nonexistence of latent ambiguity, and to enable the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time the will was made, whereby to determine the intention of the testator." In *Wigram on Extrinsic Evidence*, on the interpretation of wills, after citing cases to prove that extrinsic evidence may be resorted to, the author says "they might be multiplied without end," and adds, "They appear to justify the conclusion that every claimant under a will has a right to require that a court of construction, in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare." Quoted with approval in *Society v. Mead*, 131 Ill. 362, 23 N. E. 603. In *Patch v. White*, 117 U. S. 210-217, 6 Sup. Ct. 617, 710, it is said: "A latent ambiguity in a will, which may be removed by extrinsic evidence, may arise: (1) Either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or (2) when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not

belong to the testator." After citing cases, the court concludes: "By merely striking out the words 'six' and 'three' from the description of the will, as not applicable [unless interchanged] to any lot which the testator owned, * * * the residue of the description, in view of the context, so exactly applies to the lot in question that we have no hesitation in saying that it was lawfully devised to Henry Walker." Page 220, 117 U. S., and pages 617, 710, 6 Sup. Ct. In *Moreland v. Brady*, 8 Or. 303, in considering a question of this character, the court said: "We apprehend there can be no question of the admissibility of extraneous oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was at the time he made the will in question. This, we think, is unquestionably the rule established by the decided cases. This being done, it appears that the testator had no such lots as those described as lots 1 and 2 in the particular block named. This renders it certain that the lots named were erroneous, and the words describing them can have no possible operation, and must be rejected." In *Decker v. Decker*, supra, by the terms of the will the testator devised 20 acres off the W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 33, township 18 N., range 11 W. The evidence, however, showed that the testator never owned N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ section 33, or any part of it, but he did own N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of the section. Held, that there was a latent ambiguity in the devise, the descriptive words of the land devised being in part false; that the false description might be stricken out, and the devise sustained, as embracing the land owned by the testator.

Keeping in view the foregoing rules of construction, it seems plain that the testator did not intend to leave the two 40-acre tracts in N. E. $\frac{1}{4}$ of section 22 to descend as intestate estate. He, in plain words, devised to Joseph 100 acres of land, and then follows with a particular description; that is, 60 acres off of the west side of S. E. $\frac{1}{4}$ of section 22, and 40 acres, being the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 22. Thereby the 40-acre tract was made to overlap the north 30 acres of the 60 acres which was to be a part of the 100 acres devised to Joseph. The east 10 acres of the 40 devised to Joseph the testator never owned. So that the general purpose to devise to Joseph 100 acres would be defeated, and he would take but 60 acres, under the devise, and the adjoining 40 acres on the north of the 60 acres is left undevised, and the general intent for the disposition of the entire tract would be defeated. It is also apparent that the purpose of the testator, as expressed in the will, was to give his son Edward L. Rodman 40 acres of land. Indeed, the will says, "I will and bequeath 40 acres of land to my son Edward L. Rodman." The land is then described as the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 22,—land which the testator never owned;

but he did own 40 acres lying directly north of the 40-acre tract described, which was known as S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 22. If the will is to be construed as contended for by plaintiffs in error, the devise of the 40 acres of land to Edward will be defeated entirely, and the intention of the testator will be disregarded. If, therefore, by any of the recognized rules of construction, the will may be so construed as to give the language of the testator effect, and thus carry out the evident intention, not only to dispose of his entire estate, but to give to his sons, Joseph and Edward, the land intended to be devised to them, it is the duty of the court to adopt that construction. Redf. Wills, p. 469, says: "Where the testator misdescribes his estate as being in different localities from the fact,—putting one estate in the locality of another, and vice versa,—it was held that where sufficient appeared upon the face of the will, as applied to the subject-matter, to show that such misdescription was a mere mistake, either of the testator or the person who drew up the will, that it would not have the effect to defeat the obvious intention of the testator." While words cannot be added to a will, yet in arriving at the intention of the testator, as has been shown, by the authorities, so much as is false in the description of the premises devised may be stricken out; and after striking out the false description, if enough remains to identify the premises intended to be devised, the will may be read and construed

with the false words eliminated therefrom. Adopting that rule here, the second and third devises will read as follows: "Second. To my son Joseph L. Rodman I will and bequeath one hundred acres of land (100),—sixty acres (60) off of the west side of the southeast quarter of section twenty-two (22), forty acres (40) being the ——— quarter of the ——— quarter of section twenty-two (22). Third. To my son Edward L. Rodman I will and bequeath forty acres of land, being the ——— quarter of the ——— quarter of section twenty-two (22)." Bearing in mind that the testator owned two 40-acre tracts in N. E. $\frac{1}{4}$ of section 22, and reading the two clauses of the will in the light of surrounding circumstances, we think all difficulty is removed, in regard to the lands devised by those two provisions of the will. The testator, owning two quarters of a quarter of section 22, devised one quarter to his son Joseph, and the other quarter to his son Edward, and the two sons took and held the two tracts undivided. The circuit court, in its decree, held that the two 40-acre tracts were devised by the will; the S. W. 40 to Joseph, and the S. E. 40 to Edward. In this respect, we think the court erred; but as the error was one which did not affect plaintiffs in error, they having no interest whatever in the premises, the error was one which did no harm, and hence no ground for reversing the decree. The decree of the circuit court will be affirmed. Affirmed.

GOODE v. RILEY.

(28 N. E. 228, 153 Mass. 585.)

Supreme Judicial Court of Massachusetts. Middlesex. May 19, 1891.

Exceptions from superior court, Middlesex county.

Bill by George F. Goode against Patrick J. Riley to reform a deed. Decree for plaintiff. Defendant brings exceptions. Exceptions overruled.

Geo. F. Richardson and John Davis, for plaintiff. *C. S. Lilley, A. G. Lamson, and John J. Hogan*, for defendant.

HOLMES, J. This is a bill in equity for the reformation of a deed. The judge who tried the case found the following facts proved beyond a reasonable doubt:

The parties, just prior to the execution and delivery of the deed, made and completed an oral agreement, the plaintiff to sell and the defendant to buy a lot of land, situate on the southerly side of Summer street, in Lowell, bounded and described as testified to by plaintiff, and a warranty deed thereof was to be executed and delivered; the parties were upon the land together, and then both saw and examined the same, and knew the location, description, and bounds thereof, and the rear line of the premises was then marked by a board fence five feet high, and other monuments, and both parties understood and knew its exact location and limits; the deed, when executed and delivered, described more land, to-wit, about 1,031 square feet more, to the rear and beyond said board fence, land not owned by the plaintiff, and so much more than was bargained for; and both parties then erroneously supposed and believed that said deed described the land orally agreed upon, and no more. This mutual mistake of the parties was not discovered until two months or more thereafter.

The court also found that the plaintiff had not been guilty of negligence or laches, and that he was entitled to the relief prayed for,—a decree to reform and rectify said deed.

The only question argued is raised by the defendant's exception to the refusal of a ruling that, if both parties intended that the description should be written as it was written, the plaintiff was not entitled to a reformation. It would be a sufficient answer that the contrary is settled in this commonwealth. *Canedy v. Marcy*, 13 Gray, 373, 377; *Glass v. Hulbert*, 102 Mass. 24, 34; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 319; *Wilcox v. Lucas*, 121 Mass. 21; *Johnson v. Taber*, 10 N. Y. 319; *Bush v. Hicks*, 60 N. Y. 298; *Andrews v. Andrews*, 81 Me. 337, 17 Atl. Rep. 166; *May v. Adams*, 58 Vt. 74, 78, 3 Atl. Rep. 187; *Fuchs v. Treat*, 41 Wis. 404. In view of these, among other, cases, we shall not follow the elaborate argument which was addressed to us in favor of a different rule, but we will add a few words to explain our opinion somewhat more fully.

When both parties to a conveyance have intended to describe a certain parcel of land identified by their senses, and by the

words of their previous agreement, and have used words supposed by them to be apt for their purpose, but in fact describing that parcel, and something more, the full purport of all their acts, taken together, is only to convey the parcel intended; and yet that result cannot be reached by way of construction merely, for you cannot prove a mere private convention between the two parties to give language a different meaning from its common one. *Waterman v. Johnson*, 13 Pick. 261, 266, 267; *Paine v. Woods*, 108 Mass. 160, 170; *Flynn v. Bourneuf*, 143 Mass. 277, 278, 9 N. E. Rep. 650; *Millard v. Bailey*, L. R. 1 Eq. 378, 382; *Shore v. Wilson*, 9 Clark & F. 355, 565, 566; *Drummond v. Attorney General*, 2 H. L. Cas. 837, 862, 863. It would offer too great risks if evidence were admissible to show that when they said 500 feet they agreed it should mean 100 inches, or that Bunker Hill Monument should signify the Old South Church. As an artificial construction cannot be given to plain words by express agreement, the same rule is applied when there is a mutual mistake, not apparent on the face of the instrument.

Since, then, the instrument must be construed to mean what the words would mean if there were no mistake, evidence of the mistake shows that neither party has purported or been understood to express assent to the conveyance as it stands. It is not necessarily fatal that the evidence is parol which is relied on to show that the contract was not made as it purports on the face of the document to have been made. There was a time when a man was bound if his seal was affixed to an instrument by a stranger and against his will. But the notion that one who has gone through certain forms of this sort, even in his own person, is bound always and unconditionally, gave way long ago to more delicate conceptions. See, e. g., *Wall v. Hickey*, 112 Mass. 171; *McClurg v. Terry*, 21 N. J. Eq. 225.

So it is settled, at least in equity, that this particular kind of parol evidence—that is to say, evidence of mutual mistake as to the meaning of the words used—is admissible for the negative purpose we have mentioned. And this principle is entirely consistent with the rule that you cannot set up prior or contemporaneous oral dealings to modify or override what you knew was the effect of your writing. *Batchelder v. Insurance Co.*, 135 Mass. 449.

But the effect of the evidence is not to show that no conveyance was made. It is only to show that no conveyance was made of part of the land embraced in the description. Obviously, therefore, it would be most unjust simply to rescind the whole transaction, and, in order to do complete justice, the grantor who has used too extensive language should have a reconveyance to set his title right on the face of the instrument; for, as things stand, a purchaser without notice could hold him to the words which he has used. *Cross v. Bean*, 81 Me. 525, 17 Atl. Rep. 710; *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N. E. Rep. 747. If a purchaser were attempting to insert a parcel left out under similar circumstances, he would be

met by the statute of fraud. But there is no such difficulty here. Glass v. Hulbert, 102 Mass. 24, 35.

The defendant's testimony, although ambiguous, looked towards the conclusion that the price was fixed by the num-

ber of feet; but this was denied by the plaintiff, and it does not appear what the judge found to be the fact, or what he did, and no question as to whether an allowance should be made to the defendant is before us. Exceptions overruled.

FARMERS' LOAN & TRUST CO. v.
SIEFKE.

(39 N. E. 358, 144 N. Y. 354.)

Court of Appeals of New York. Jan. 15, 1895.

Appeal from common pleas of New York city and county, general term.

Action by the Farmers' Loan & Trust Company, as committee for Frederick Siefke, against Henry Siefke. From a judgment of the general term (22 N. Y. Supp. 546) affirming a judgment for defendant, plaintiff appeals. Affirmed.

David McClure, for appellant. Brainard Tolles, for respondent.

ANDREWS, C. J. The complaint alleged that the note sued upon was given for value, and was under the hand and seal of the defendant. The answer contained a general denial of the allegations in the complaint, and in separate paragraphs, stated to constitute separate defenses, alleged that the note was without consideration, and that it was altered in material parts, and, among other things, by affixing a seal thereto without the consent or privity of the defendant. On the trial the note was offered in evidence by the plaintiff, and he then rested. The execution of the note by the defendant seems to have been admitted, as no proof was given upon the subject. It purported to be signed by him, and a seal was attached to his signature. The defendant thereupon entered upon the defense. The question of consideration was litigated, and the defendant also gave proof tending to show that the seal was attached without his knowledge or consent, by the plaintiff, after the execution and delivery of the note. The evidence on the part of the defendant, as to the alteration by the addition of the seal, was met by evidence in behalf of the plaintiff that the seal was attached before execution. The case was submitted to the jury, under a charge of the judge, and the jury rendered a general verdict for the defendant. Judgment was entered on the verdict, from which the plaintiff appealed to the general term, which affirmed the judgment, and this appeal is from the judgment of affirmance.

The allegations of error are founded mainly upon the charge to the jury. The judge charged, in substance, that if the seal was attached to the note by the plaintiff after execution and delivery, without the knowledge or consent of the defendant, it constituted a material alteration, and the note was void. There was no exception to this part of the charge, and it must be taken, on this point, to have correctly stated the law. We are not to be understood, however, as dissenting from this view, but it is unnecessary now to consider it. The court further proceeded to charge that the plaintiff was bound to establish, by a preponderance of evidence, that the seal was not attached after the signature to

the note. This was qualified afterwards by the statement that this burden rested upon the plaintiff after testimony had been given to show that the seal was attached after the inception of the note. The plaintiff's counsel excepted to the charge, as made and explained. This exception presents the principal question in the case. We think the charge was correct. Upon the pleadings, a general denial having been interposed by the answer to the whole complaint, the plaintiff was bound to establish every material fact therein alleged. The primary issue was the execution or nonexecution by the defendant of a sealed instrument. The plaintiff alleged the making by the defendant of a specialty creating a pecuniary obligation, and, issue having been taken on this allegation, the plaintiff was bound to establish the allegation by proof. If it had turned out on the trial that the allegation had been made by mistake, and that the instrument was not sealed, but was a simple contract only, or that the seal had been attached after execution, by a stranger, without the privity or knowledge of the plaintiff, it would have been in the power of the court to have permitted an amendment of the pleadings upon such terms as it should deem just. But, as the pleadings stood, the question whether the defendant had executed a sealed instrument was an issuable fact, which was asserted on one side and denied on the other, and which the plaintiff was bound to establish, as a part of his case. The defendant, under a general denial, may adduce evidence to controvert what the plaintiff is bound to prove in the first instance. *Milbank v. Jones*, 141 N. Y. 345, 36 N. E. 388, and cases cited. And the general rule is well established that whatever a plaintiff is bound to prove in the first instance, as part of his case, he is bound to establish by a preponderance of evidence. The burden of proof upon the issue of a material alteration of a written instrument, sued upon in its existing condition, presents no anomaly, but is governed by the general rule that the party alleging that the instrument sued upon is the act and deed of the defendant must establish it by proof. The case of *Schwarz v. Oppold*, 74 N. Y. 307, is a precise authority for the proposition that, under a general denial in an answer in a suit brought upon a written obligation, a material alteration may be proved. Under this authority, we see no escape from the conclusion that evidence of alteration, which goes to the identity of the instrument, controverts a fact which a plaintiff is bound to prove in the first instance,—that the instrument is the act of the defendant.

There is confusion, sometimes, in treating of the burden of proof, arising out of unexact definitions. The burden is upon a plaintiff to establish his cause of action, when it is, in proper form, denied by the other party. In actions upon a promissory note, this burden is, in the first instance, dis-

charged by giving evidence tending to show that the note was signed by the defendant. Proof of signing also identifies and proves the seal, when the action is upon a sealed instrument. This, *prima facie*, establishes the cause of action. But a defendant is not concluded. He may give evidence, under a general denial, to show that the signature is a forgery, or that the note had been materially altered by the plaintiff without his consent, or many other things which might be mentioned, showing that the plaintiff never had a cause of action. It is very common to say, in such cases, that the burden is upon the defendant to establish the fact relied upon. All that this can properly mean is that, when the plaintiff has established a *prima facie* case, the defendant is bound to controvert it by evidence; otherwise, he will be cast in judgment. When such evidence is given, and the case, upon the whole evidence,—that for and that against the fact asserted by the plaintiff,—is submitted to court or jury, then the question of the burden of proof as to any fact, in its proper sense, arises, and rests upon the party upon whom it was at the outset, and is not shifted by the course of the trial; and the jury may be properly instructed that all material issues tendered by the plaintiff must be established by him by a preponderance of evidence. See *Davis v. Jenney*, 1 Metc. (Mass.) 221; *Simpson v. Davis*, 119 Mass. 269; *Perley v. Perley*, 144 Mass. 104, 10 N. E. 726. The general rule of pleading, which also accords with reason, is that defenses which assume or admit the original cause of action alleged, but are based upon subsequent facts or transactions which go to qualify or defeat it, must be pleaded and proved by the defendant; and, on the other hand, the cause of action alleged by the plaintiff, and all its material incidents, must be asserted and proved by him; and, in both cases, the final event must be supported by a preponderance of evidence in favor of the party tendering the issue. This is illustrated in cases somewhat germane to the one before us. It is held by the weight of authority that the alteration of a bill or note need not be pleaded, when the instrument is declared on in its altered state, but, where the declaration is on the instrument in its original condition, the alteration must be specifically pleaded. *Hirschman v. Budd*, L. R. 8 Exch. 171; *Byles, Bills* (7th

Am. Ed.) 328. In the latter case, the plaintiff sues on the actual contract made, and the defendant is seeking to defeat a recovery because it had been subsequently tampered with, and this defense must be pleaded and sustained by a preponderance of proof.

The appellant, in support of his contention that the charge as to the burden of proof was erroneous, cites some cases in other states, which, to some extent, sustain his view. But it seems to us they are opposed to sound principle, and, at least, cannot be followed in this state, in view of our decision in *Schwarz v. Oppold*. The remark quoted from the opinion in the case of *Williamsburgh Sav. Bank v. Town of Solon*, 136 N. Y. 465, 32 N. E. 1058, was in a case where the supposed addition of the seal made the instrument what it was intended to be, both by the legislature and the town. The case, however, was decided wholly irrespective of the question of alteration, on the ground of a former adjudication. Our conclusion is that the charge was not erroneous, in putting upon the plaintiff the burden of proof as to the existence of a seal when the note had its inception.

One other question, only, needs special reference. The plaintiff was not present on the trial, and his counsel, early in the case, introduced a witness to account for his absence; and the reason given was that he was partly paralyzed, and, although mentally sound, was not able to attend the trial. It seems that the fact that the plaintiff had not appeared as a witness was commented upon by counsel, and the court, in the charge, referring to the subject, said, "It is true, of course, that his testimony might have been taken at his house." This statement was subsequently excepted to, and it is claimed by the plaintiff's counsel that it was prejudicial, because an examination of a party before trial, on his own behalf, could not be taken. This is a clear misapprehension of the Code provision (section 872, subd. 5), as it now stands. The last clause in the subdivision was inserted to except a party to the action from the restriction in that subdivision. A party complying with the provisions of the other sections is permitted to perpetuate his own testimony in the case by an examination before trial. We think the judgment is right, and it should therefore be affirmed. All concur, except HAIGHT, J., not sitting. Judgment affirmed.

PEOPLE v. DOWNS.

(25 N. E. 988, 123 N. Y. 558.)

Court of Appeals of New York. Dec. 2, 1890.

Appeal from supreme court, general term, third department.

Lewis E. Griffith and *John P. Kelly*, Dist. Atty., for the People. *Orin Gambel* and *J. K. Long*, for respondent.

FINCH, J. The defendant was convicted of manslaughter in the first degree, but the general term has reversed that conviction for alleged error in the charge to the jury; and from that reversal the people have appealed to this court, insisting that the charge, fairly construed, was correct and violated no established legal rule. The prosecution proved the *corpus delicti*, the death of Logan, and the violence which caused it, by direct evidence which was in no respect disputed. His dead body was found upon the premises of the prisoner shot through the heart. The bullet had penetrated his clothing and entered his breast in a manner indicating that he was facing his antagonist when the shot was fired. The absence from the clothing of the deceased of anything like scorch or stain of powder was claimed to indicate that the weapon when fired was not in contact with his person, but at some distance from him, greater or less. The bullet was taken from the body. A pistol was found in the prisoner's room, under his bureau, having 10 chambers, the central one carrying a bullet of 32 caliber, and the 9 surrounding it of 22. A discharged shell was found in the central chamber, which the bullet taken from the body of the deceased fitted, while the 9 smaller cartridges remained undischarged. On the day of the homicide, at about midnight, the prisoner aroused a neighbor named Morey, and Dr. Harvie, saying to each that he had shot his best friend, or was afraid he had shot his best friend, but giving no explanation of the circumstances; and they, going with him to the house, found Logan lying dead near the entrance to the summer kitchen. The prisoner was pale and nervous, and on finding Logan dead was taken with a fit of vomiting, but made no effort to escape, and quietly surrendered himself to the officers who were summoned and took him into custody. He was entirely sober, and there was no evidence of intoxication. His previous relations with Logan, who was a married man, were those of intimate friendship without anything to mar or disturb it. That was the case made by the prosecution, and it presented to the jury a problem with very slight material for its solution. That Logan met his death from a pistol discharged in the hands of Downs was sufficiently proved, but whether the shot was fired intentionally or accidentally, and, if intentionally, for what reason, did not appear. The evidence disclosed no possible motive for an intentional homicide, and left the character and grade of the crime, if one had been committed, an unexplained mystery. One circumstance, however, would be sure to attract the attention of an intelligent

jury. They would ask how Logan came to be at the rear of the house, near the entrance to its living rooms, at midnight; and what he was doing there when he should have been at home with his wife and children. The saloon was in the front part of the house opening onto the street. It was closed for the night, and there had been no brawl or quarrel or disturbance there during the evening. The presence of Logan in the rear of the house, at or near midnight, and the absence of any previous quarrel or difficulty, would make it reasonably certain that something due to his presence, and sufficiently grave and serious to account for an intentional or accidental homicide, had actually occurred. What that was we have no means of knowing except through the explanation given by Downs and his wife. He testifies, in brief, that he was aroused by the noise of a scuffle in the back kitchen; that he seized the pistol, which lay upon a stand near his bed, and rushed out; that he found Logan and Mrs. Downs on the floor in the act of adultery or rape, according as the woman was consenting or resisting; that he seized Logan, who at once attacked him, and in the struggle the pistol went off; and that this was after the woman had left the room, and, as she says, while she was at the front door going out for help or escape. She testifies that Logan seized her and threw her down, but does not say whether with her consent, or why she made no outcry. Of course this explanation was open to the criticism of the prosecution and the consideration of the jury. The principal fact sworn to has a strong probability in its favor. It accounts for the presence of Logan, at midnight, on the premises where he had no right to be, and furnishes the needed motive and explanation of the homicide which occurred. Without it we cannot understand the event; with it we can easily see how it did occur, or how it might have happened. It supplies both motive and occasion. But granting so much, the rest does not necessarily follow, and it was still for the jury to say whether the shooting was accidental or intentional, whether justifiable or excusable, whether with deliberate purpose, or in the heat of passion, and without intent to kill. It is obvious that in their consideration of these questions very much would depend on the charge of the court as to the burden of proof and the operation and extent of the rule relating to a reasonable doubt. That such doubts might easily arise in many and different directions is quite apparent from the facts to which we have adverted. Take, for example, the prisoner's statement that the pistol exploded in a fight between him and Logan, and without his conscious act. If that be true, while there was a homicide there was no crime; for the killing would become merely an accident or misadventure. If, now, the burden is upon the prisoner to satisfy the jury of that fact, and unless they are so satisfied they must deem the homicide intentional, a verdict of guilty might easily result. But if that burden is not upon the prisoner, if the jury are told that it remains with the prosecution,—that

if the evidence leaves in their minds a reasonable doubt whether the killing may not have been an accident or misadventure, the prisoner must have the benefit of the doubt, because it goes directly to the vital elements of the people's case, and leaves it uncertain whether a crime has been committed at all,—the verdict of the jury might be entirely different. A similar result might attend a defense of justifiable homicide, and so the question of the burden of proof and the scope and effect of a reasonable doubt, became in the case at bar of very great importance. We have decided so recently as to make further citation needless that the rule that in criminal cases the defendant is entitled to the benefit of a reasonable doubt applies not only to the case as made by the prosecution, but to any defense interposed. (*People v. Riordan*, 117 N. Y. 71, 22 N. E. Rep. 455;) and we had earlier held under the statute defining the different classes of homicide that whether it was murder or manslaughter in one of the degrees, or justifiable or excusable, and so no crime at all, depended upon the intention and circumstances of its perpetration, and therefore mere proof of the killing raised no legal implication of the crime of murder, (*Stokes v. People*, 53 N. Y. 177.) I think the charge in this case ran counter to these rules, and was calculated to impress upon the jury a conviction that proof of the homicide carried with it a legal implication of crime which shifted the burden of proof upon the prisoner, and required him to satisfy the jury that the killing was either justifiable or excusable, at the peril of a conviction if he should fail in his attempt.

The learned trial judge began his charge with the definitions of the statute, and very fairly and correctly explained its classification of the different forms of homicide. Having done so he approached the rules which should govern the jury in deciding between them, and in so doing used expressions to which exceptions were taken. He said: "Now it is for you to say to which one of these classes of crime this evidence points. Here has been a homicide. Here has been a human life taken. It becomes a serious question as to whether or not a man shall execute the law or execute vengeance upon his fellow. If he does he must do it at the peril of either being punished for it or being able to excuse himself when called upon to answer to the wrong within one of the excuses that is fixed and given in the law. If he is not he must be found guilty of one or the other of the crimes which are imputed to him by reason of the homicide." A jury could hardly fail to understand from this language that a homicide, the fact of a human life taken, involved a legal implication of murder which must compel a verdict of guilty unless the prisoner is able to excuse himself within the statutory definitions. If there was room to doubt about the meaning it became plainer from what followed. The learned judge added: "If you reach the conclusion that he was justified in taking the life of this man within the definitions given in the books, not within any notions of your

own, but within the definitions given in the law, if you reach the conclusion that he was justified, then your verdict will be one of acquittal." Here the same idea is conveyed in another form. To acquit, the jury must "reach the conclusion" that a justification has been established. It is evident that the prisoner's counsel so understood the charge, and, after excepting to it, made a series of requests with a view of more clearly ascertaining the meaning of the charge, or procuring a modification of its terms. He asked the court to charge "that no state of proof ever changes the burden of proof; the burden remains throughout the trial upon the people;" to which the learned judge replied: "I decline to charge it in those words. I qualify it by saying that if the people establish the homicide by the use of a deadly weapon, committed by the defendant intentionally and with deliberation, that then any excuse for the commission of that crime or the commission of that act must come from the defendant." The understanding of the jury of the position of the court was quite likely to be that the burden did not always rest on the prosecution; but when a *prima facie* case of murder had been made the burden shifted to the defendant, who sought to excuse or justify. And this is in precise accord with the previous charge that where a homicide was shown to have been committed by the prisoner he must be convicted unless he is "able" to justify or excuse the act, and unless the jury "reach the conclusion" that there is legal excuse or justification. And then, to further test the attitude of the court, the defendant's counsel asked for a charge "that there is no legal implication from the fact of the shooting that the defendant intended to take the life of Logan." That was declined, and an exception taken.

Now, construing together what the court said, and what it refused to say, I think it is obvious that the jury were likely to act under the impression that a homicide proved implied crime on the part of the slayer; that a conviction must follow unless the prisoner justified or excused the act; that the burden of that defense was upon him; and that to secure acquittal he must be able to show a legal justification or excuse, and the jury must reach that conclusion if it would acquit. The learned district attorney, however, insists that the court did charge that the guilt of the prisoner must be established beyond a reasonable doubt, and refers to several passages in which that was said. A reference to them indicates that none of them related to the defense of justification or excuse, nor did they indicate that a reasonable doubt would operate in the prisoner's favor beyond the case made by the prosecution. Thus, in describing the character of the proof requisite to establish the *corpus delicti* as distinguished from the guilt of the prisoner, the court said the former must be proved by direct evidence, and the latter beyond a reasonable doubt. In describing the killing of Logan, the court said: "I do not know that it is controverted on either side that he came to his death by a bullet, a pistol shot, as

almost conceded, but you are to find that fact. If there is any doubt about it, of course the defendant has the benefit of the doubt." Upon request of the prisoner's counsel, the court also charged "that it is incumbent upon the people to prove affirmatively beyond a reasonable doubt what grade of crime, if any, was committed;" and also, upon the like request, "that if upon the whole evidence of the people and the defendant taken together there is a reasonable doubt in the minds of the jury as to whether or not the defendant discharged the pistol at Logan with intent to kill him, they must acquit the defendant of the crime of murder in both degrees." I am unable to see that these expressions at all modify or control what was said and refused to be charged as to the burden of proof, and the manner in which justification or excuse should be proved. They fall very far short of a cure for the error which was committed. Taking the charge together, and construing it

as a whole, I am unable to resist the conviction that in the minds of the jury it shifted the burden of proving his defense upon the prisoner, and deprived him as to that defense of the benefit of a reasonable doubt. While there is no legal implication of the crime of murder from the bare fact of a homicide, the jury may infer it as a fact, and may do so even though no motive is assigned for the act, and the case is bare of circumstances of explanation. *People v. Conroy*, 97 N. Y. 77. But the inference is one of fact which the jury must draw if such seems to them to be their duty, and not one of law which the court may impose upon their deliberation, and then upon that assumption shift the burden upon the prisoner, and require him to prove that no crime has in fact been committed. We think, therefore, that the order of the general term, reversing the judgment of conviction, was right, and should be affirmed. All concur, except RUGER, C. J., not voting.

COLORADO COAL & IRON CO. et al. v.
UNITED STATES.

(8 Sup. Ct. 131, 123 U. S. 317.)

Supreme Court of the United States. Nov. 21,
1887.

Appeal from the circuit court of the United States for the district of Colorado.

Lyman K. Bass, B. H. Bristow, and David Willcox, for appellants. Sol. Gen. Jenks, for the United States.

MATTHEWS, J. This is a bill in equity filed in the name of the United States by the attorney general on January 22, 1880, the object and prayer of which are to declare void and cancel 61 patents for as many distinct pieces of land, situated at different places in Las Animas county, in the state of Colorado, amounting in the aggregate to 9,565.95 acres. To the original bill the Southern Colorado Coal & Town Company, a corporation organized under the laws of Colorado, was the sole defendant. The patents in question were issued at different times between October, 1873, and October, 1874, upon pre-emption claims, under the act of 1841. In each case there appeared to be filed all the necessary and proper affidavits, duly verified before the register or receiver of the land-office at Pueblo, showing that the pre-emptors had entered and settled in person upon the land on a day named, and had made improvements thereon, the nature of which were set out in detail, and that the lands in question were non-mineral lands, and subject to pre-emption under the acts of congress relating thereto. Between May, 1873, and December, 1875, warranty deeds in the names of the pre-emptors and patentees were made, acknowledged, and recorded, apparently conveying the premises to William S. Jackson, as trustee, who represented a number of individuals who had deposited money in his hands to be used in the purchase of lands in Colorado. On June 1, 1876, by deed duly acknowledged and recorded, but without covenant of warranty, Jackson conveyed and released all these lands to the defendant, the Southern Colorado Coal & Town Company. On January 20, 1880, that corporation was consolidated with other corporations under the name of the "Colorado Coal & Iron Company," to which, upon that date, the lands in question were conveyed. Under date of February 1, 1880, the coal and iron company made a mortgage covering the premises in question, with others, to Louis H. Meyer, as trustee, to secure an issue of bonds amounting to \$3,500,000. On January 7, 1882, an amendment to the bill was filed, making the Colorado Coal & Iron Company, the consolidated corporation, together with Meyer, the trustee in the mortgage, parties defendant. The purchase price of the lands to the government was \$11,997.45, which was paid at

the time to the proper officer,—\$1,813.14 in cash, and the remainder in certificates known as "Agricultural College Scrip," which by law was receivable for that purpose.

It is charged in the bill that these patents were procured by means of a fraudulent conspiracy entered into by and between Irving W. Stanton, register of the land-office, Charles A. Cook, receiver for the land-district, at Pueblo, in Colorado, Alexander C. Hunt, and others unknown, who, it is alleged, organized and had incorporated the Southern Colorado Coal & Town Company. In furtherance of this conspiracy, and as the means of accomplishing its purpose, it is alleged "that neither of the supposed pre-emptors of the land as aforesaid described by their names, as stated in said several proofs of pre-emption, or in the said certificates of location, ever settled upon the said lands, or improved the same, as represented in said several proofs of pre-emption; and that no person or persons whatsoever, as represented in either of said certificates of location, appeared or presented himself before said Stanton or Cook, or either of them, at any time, and made proof of pre-emption or agricultural college scrip location, either as pre-emptor or as witness for any pre-emptor as aforesaid described, as in and by said proofs of pre-emption and location certificates, or either of them, as aforesaid, is supposed, but that the same, and each of them, are false and fraudulent, and were designed, made, and executed by said Stanton and Cook and said Hunt, and the said persons to your orator unknown, or some one or more of them, in the manner aforesaid, and for the purpose of fraudulently depriving your orator of its title to the said pieces of land."

It is further alleged that all the said supposed pre-emptors are fictitious persons, and their names are fictitious names, and that the supposed names that appear as witnesses to the said several proofs of pre-emption are fictitious names, and that no such person or persons, either as pre-emptors or as witnesses, have ever lived or been known in the county of Las Animas, where said pieces and parcels of land are located, and, in fact, that no such persons exist.

It is further alleged in the bill "that the aforesaid pieces and parcels of land are not agricultural land, and are not suitable for agricultural or grazing purposes, and are of no value for any purpose except for the coal deposits therein contained. * * * That the said several pieces and parcels of land contain large and valuable deposits of coal, and that the said deposits of coal were known to the said Stanton and Cook and said Hunt, and to the said person or persons to your orator unknown, who wrote out, signed, and executed, or caused to be written out, signed, and executed, the several proofs of pre-emption and non-mineral affidavits at the

time the said several proofs of pre-emption and non-mineral affidavits were made out, signed, and executed."

It is also charged in the bill that the said Hunt was a stockholder in the Southern Colorado Coal & Town Company, and general manager of its business, and that the incorporators of said company and the trustees thereof, including William S. Jackson, "knew at the time the aforesaid described land was conveyed to said company by said William S. Jackson, as hereinbefore described, that the several patents to said several pieces and parcels of land had been fraudulently obtained from your orator, and knew that the said several supposed pre-emptors and patentees were myths and fictitious persons, and knew that the said Jackson had no right, title, or interest in said land, or any part thereof."

The answer of the Southern Colorado Coal & Town Company, filed November 2, 1881, specifically denies all the allegations of the bill alleging fraud, and denies that the said lands, or any portion of them, were mineral lands in the sense of not being lands capable of being acquired under the pre-emption law, and sets up by way of further defense that it was a purchaser of all the said lands in good faith for a valuable consideration without any knowledge or notice whatever of any or either of the pretended fraudulent acts and conspiracies in the bill alleged. Louis H. Meyer, on June 5, 1882, answered to the same effect, and by a stipulation the answer of the Southern Colorado Coal & Town Company was directed to stand as the answer of the Colorado Coal & Iron Company. Replications were duly filed, and the cause was heard on a large amount of proofs, resulting in a decree in favor of the complainant, declaring all the patents in the bill mentioned, and the subsequent conveyances of the land therein described to the defendants, to be fraudulent and void, and decreeing that they should be held for naught, and be delivered up to be canceled. The present appeal is from that decree.

It was held by the circuit court that the charge in the bill that the supposed pre-emptors and patentees were fictitious persons, having no existence, was sufficiently proved; that, consequently, there being no grantees, no legal title passed from the United States; and that, as the defendants acquired no legal title by virtue of the supposed conveyances to them, they cannot claim protection as bona fide purchasers for value without notice of the fraud. 18 Fed. 273.

It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims, and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity, as against the parties perpetrating

it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them; but it is not such a fraud as prevents the passing of the legal title by the patents. It follows that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a bona fide purchaser for value without notice is perfect.

In reference to such a case, it was said by this court in *U. S. v. Minor*, 114 U. S. 233, 243, 5 Sup. Ct. 836: "Where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity, and set aside as void, if the fraud is proved, and there are no innocent holders for value." *Meador v. Norton*, 11 Wall. 442, 458. It is, indeed, an elementary doctrine of equity that, where a grantor has been induced by fraud to part with the legal title to his property, he cannot reclaim it from subsequent innocent purchasers for value. Hence it becomes necessary, to support the decree of the circuit court, to maintain, as that court declared, that the legal title to the lands in question did not pass from the United States by virtue of the patents, because there were in fact no grantees. And it was that proposition of fact which, by the proofs introduced into the cause, the United States undertook to establish. The evidence on that point is found in the depositions of 14 persons examined as witnesses. They were called to prove, and did prove, in the first place, in respect to the several tracts of land in controversy, the facts that they had not been settled upon, and that no improvements had been made upon them by any person. They also testified, in substance, that they were acquainted, at the time of the transactions, with the lands, and were acquainted with the people then living in Las Animas county, some of them stating that they knew every white man residing at that time therein; that with the exception of one person, named Martine, there were no persons in the county at the time bearing the names specified as pre-emption claimants, and no persons bearing the names subscribed as witnesses to their statements; and that they never saw or heard of persons residing in the county having such names. This is the extent of this description of evidence, the weight of which is to be estimated in connection with the fact that the county of Las Animas, although sparsely settled, embraces an area extending about 150 miles from east to west, and about 40 miles from north to south. In corroboration of it, testimony was introduced, on behalf of the United States, of experts in handwriting, with a view of establishing, by a comparison of the documents, that they were fabricated; which, however, was met by the opposing opinions of other experts called on the part of the defendants. This evidence we think not only inconclusive, but entitled to no weight, not at

all supporting the inference sought to be drawn, that the same handwriting is traceable in the signatures of the various names. The conclusion, if warranted at all, must depend upon the statements of the other witnesses, the substance of whose testimony has already been given, and such presumptions of fact or law as legitimately arise thereon.

It is charged in the bill that these title papers were falsely and fraudulently made by the register and receiver, combining with Hunt and others unknown in a conspiracy for that purpose; but there is no direct proof of such a conspiracy. It is sought to be inferred from the fact that the pre-emption statements were falsely made, and from the evidence tending to show that the persons named were fictitious. There is no proof to connect the register and receiver with such a conspiracy, except the fact that the affidavits purport to have been made before them, and were certified to by them. Hunt's connection with it rests upon the fact that he procured deeds from the supposed patentees, conveying the lands to Jackson in pursuance of a bargain with him. It may well be admitted that if there were no actual persons who made applications as pre-emption settlers, none who made and signed the necessary declarations and affidavits, and no persons as witnesses who attested the same, the register and receiver must have known the fact; but the fact of the conspiracy depends upon prior proof that the alleged transactions were mere fictions. The proof necessary to justify that conclusion is supposed to be found in the facts testified to by the witnesses, a summary of which has been given.

It certainly does not follow that no such persons in fact existed, as a necessary conclusion from the testimony of these witnesses that they knew no such persons as named in these papers. The utmost that can be said, as was said by the learned judge of the circuit court in delivering judgment in the case, is that "if none of them were ever in the county, and no improvements were ever made upon the land, then the proofs upon which the patents issued were false, and the inference that the papers were manufactured without the presence of any persons bearing or assuming the names of the patentees is not more unreasonable than would be the inference that 61 actual persons committed perjury themselves, and suborned as many others to perjure themselves as witnesses, in order to acquire the title." This, it is argued, establishes at least that it is more probable that the grantees were fictitious than that they were real persons, and that, in view of the difficulty, if not the impossibility, of proving the negative proposition that no such persons existed, and of the fact that the defendants connect their title and right with a transaction which must have occurred with these grantees if

they had an actual existence, the burden of proof is shifted from the United States to the defendants, and that, as the latter introduced no evidence tending to show the fact as they claimed it to be, the case of the complainants must be considered as established by a preponderance of proof.

We have had recent occasion to consider the question of the character and degree of proof necessary in such cases to invalidate titles held by purchasers in good faith for value, and without notice, under patents issued by the United States. In *Maxwell Land-Grant Case*, 121 U. S. 325, 379, 7 Sup. Ct. 1015, it is said: "The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that to annul such an instrument, and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided. * * * We take the general doctrine to be that when, in a court of equity, it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated, and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the president of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which

produces conviction, shall make such an attempt successful."

It thus appears that the title of the defendants rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs, and establishing the conclusion to which they are directed, rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish. It is, indeed, sometimes said that a negative is incapable of proof, but this is not a maxim of the law. In the language of an eminent text writer: "When the negative ceases to be a simple one,—when it is qualified by time, place, or circumstance,—much of this objection is removed; and proof of a negative may very reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative." Best, *Ev.* (Am. Ed.) 1883, § 270. So, also, *Id.* § 273: "When a presumption is in favor of the party who asserts the negative, it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative." Also *Id.* § 276: "This appears from the case of *Doe v. Whitehead*, 8 Adol. & E. 571, which was an ejectment by a landlord against a tenant on an alleged forfeiture by breach of a covenant in his lease to insure against fire in some office in or near London, in which it was contended that it lay on the defendant to show that he had insured, that being a fact within his peculiar knowledge. The argument ab inconvenienti was strongly urged, viz., that the plaintiff could not bring persons from every insurance office in or near London to show that no such insurance had been effected by the defendant, and *Rex v. Turner*, 5 Maule & S. 206, *Apothecaries' Co. v. Bentley*, *Ryan & M.* 159, and some other cases of that class, were cited. But Lord Denman, C. J., in delivering judgment, said: 'I do not dispute the cases on the game laws which have been cited; but there the defendant is in the first instance shown to have done an act which was unlawful unless he was qualified, and then the proof of qualification is thrown upon the defendant. Here the plaintiff relies on some thing done or permitted by the lessee, and takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly within the defendant's knowledge, but that does not vary the rule of law.' And in the same case *Littledale, J.*, said: 'In the cases cited as to game, the defendant had to bring him-

self within the protection of the statutes; and a like observation applies to *Apothecaries' Co. v. Bentley*. But here, where a landlord brings an action to defeat the estate granted to the lessee, the onus of proof ought to lie on the plaintiff.' And this ruling has been upheld by subsequent cases. *Toleman v. Portbury*, L. R. 5 Q. B. 288; *Wedgevood v. Hart*, 2 Jur. (N. S.) 288; *Price v. Worwood*, 4 Hurl. & N. 512."

Mr. Greenleaf states the rule in equivalent terms. He says (1 *Greenl. Ev.* § 78): "To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, this negative is an essential element in his case." And in section 80: "So, where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise, or fraud, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged."

In the present case the facts shown are, in our opinion, not sufficient to overcome the presumption of innocence on the part of the register and receiver of the land-office. It is quite consistent with these facts that real persons, whether under their own or under assumed names, did actually appear before them and make pre-emption claims. There is no testimony whatever tending to establish directly any complicity on their part with the fraud which may have been practiced upon them, and not through them. It is certain that there were real persons acting in the matter. The purchase price due on the entry of the lands was in fact paid. There is no proof of any actual fabrication of the papers, the genuineness of which is not negated by any internal evidence. The allegations in the bill that they were in fact manufactured by the register and receiver and Hunt, or by any one with their connivance, are entirely unsupported by direct evidence.

It is alleged in the bill, also, that "by the rules and regulations which then and since have governed it in the issue of patents for land located with agricultural college scrip, no patent was issued by your orator except on presentation at its general land-office by the person making such location, his agent or his assign, of the duplicate certificate as aforesaid delivered to the locator for the land for which a patent is claimed," and "that after the forwarding by the said Stanton and Cook of said supposed proofs of pre-emption, said agricultural college scrip, said money, said non-mineral affidavit, and said dupli-

cate certificate, in each of the said pretended pre-emption claims as aforesaid mentioned, to your orator's general land-office at Washington, the said Alexander C. Hunt, pretending to act as agent of each of said supposed pre-emptors, presented to the officers of the general land-office such other duplicate certificates of location, and requested said officers to cause a patent for each of the said several pieces of land to issue from your orator to the said supposed persons in each case purporting to claim and apply for the same." And it is added that the officers of the general land-office, confiding in the honesty of the register and receiver, and believing the statements contained in the proofs to be true, did issue its patents therefor. The allegation is that the patents were issued to Hunt. In point of fact, it appears from the evidence that a number of patents were delivered to Britton & Gray, W. P. Dunwoody, and W. W. Cowling, respectively, through whom the duplicate certificates were presented to the general land-office for that purpose. There is no allegation that these were not real persons, nor are any charges made against them as participants in the fraud. They professed to represent the parties entitled to the patents; they must have known for whom in fact they were acting. There is nothing to show that they were not accessible as witnesses. From the correspondence in the record it appears that Britton & Gray were transacting business in the city of Washington, and that Cowling was also a resident of the District of Columbia. None of these parties were called by the government as witnesses. Whatever may be said as an excuse for the failure to call Hunt and Stanton and Cook, on the ground that they are charged with being the actual conspirators in the fraud, no reason can be assigned for not calling Britton & Gray, Dunwoody, and Cowling.

Neither do we think the reason assigned as an excuse, on the part of the government, for not calling the register and receiver as witnesses, is valid or satisfactory. One of them, it was said at the bar, had died. But the other might and ought to have been examined. He was one of its own officers, through whom the government had received the price of the lands sold, and which it has ever since retained. If his official conduct was impugned, nevertheless his misconduct, if proved, was not imputable to the defendants, and they should not be prejudiced by the odium of an accusation against him. The United States had trusted him, and, inspired by that confidence, the defendants also had relied upon his official acts. In this faith they had paid full value for what they had reason to believe was a perfect title. They were not accused of any complicity with, nor had they any knowledge of, the fraud charged. In the absence of direct proof of his guilt, the government could not properly treat the defendants as his confederates, nor deprive them of any defense which as a witness he might be

able to make for himself. The United States had no higher interest at stake than to establish the truth and justice of the transaction. It was due from it to these parties, whose estate this suit was instituted to defeat, to produce and examine as witnesses those who must have had the best knowledge of the facts, so as not to force the defendants to explanations which, by the very theory of their innocence and ignorance, they were incapable of making. To raise a suspicion, however strong, of the fraud and wrong-doing of its own officers is not enough to justify the government in casting upon the defendants the burden of establishing their title.

In addition warranty deeds, made to Jackson as trustee, were put in evidence by the government, reciting a consideration in each case, amounting in the aggregate to \$52,200, to the payment of which Jackson also testifies. Each of these deeds was executed, acknowledged, and recorded in conformity with law. They were regular on their face, the acknowledgments purporting to have been taken by public officers before whom, it is recited, the grantors severally appeared and acknowledged their execution. These officers, if called and examined as witnesses, would probably have thrown some light upon the transaction, and should have been examined upon the points in issue. It is to be presumed that they could have testified whether any persons in fact appeared before them at the times and places named in their certificates, and whether, if so, they were identified as being the persons named as grantors in the deeds. None of them were in fact called on the part of the United States, and no reason is assigned for not having done so. It thus appears that the government did not make all the proof of which the nature of the case was susceptible, and which was apparently within its reach.

On the other hand, the defendants, by their evidence, have fully established all the steps by which they became connected with the transaction. The lands were bought and paid for at their full value by William S. Jackson, acting for himself and associates, who united together for the purpose of making purchases of land in that region, upon Jackson's belief and assurance of its ultimate value, expecting it to increase by the building of railroads and general growth of the country. He arranged with Hunt, who was engaged in dealing in lands, and had been governor of the territory, to pay for titles to such lands as he might accept. Hunt submitted to him descriptions of lands which he said he could control, from which Jackson made selections. For these Hunt sent to Jackson deeds duly executed, attested, and acknowledged, accompanied by receiver's certificates in regular form, showing that the party named as grantor was entitled to a patent. These he was advised by counsel to accept, and did accept in good faith, as being equivalent to patents. In many instances the patents were

issued before the deeds were executed. Jackson had no connection whatever with making the proofs of pre-emption, and had no knowledge in reference thereto, except such as was disclosed by the deeds and certificates, in reliance upon which, and without visiting the lands, or having them examined, he bought. The deeds to Jackson were duly acknowledged before competent officers by persons certified to be the grantors therein named. The transactions were several, as regards the various tracts of land, and successive, during more than two years, the deeds being delivered within a period extending from May 2, 1873, to May 21, 1875. The circumstance that many of the acknowledgments of the deeds were taken in Arapahoe county before a notary in Hunt's office, while the grantors purported to be residents of Las Animas county, was not calculated to raise any suspicion of fraud, as Jackson supposed that Hunt was dealing with the pre-emptors, and was procuring their deeds to be executed for delivery to him, and it was natural to expect that this would be done at Hunt's own office. In fact, 14 of the acknowledgments were taken before other officers, and some of them in Las Animas county. That Jackson and his assigns, the coal and town company, and its successor, the coal and iron company, in good faith believed that they had acquired a valid title to these lands, is manifest from their subsequent dealing with them. They not only paid full value for the lands in the condition in which they were, but they made large investments thereon in the way of improvements. At the time of the organization of the consolidated company there were upon the premises described in the bill coke-ovens, and machinery in connection therewith, buildings constituting the town of El Moro, and coal-mine improvements, consisting of entries, rooms, gangways, tracks, chutes, repair-shops, houses, and store buildings. Coal was then, between 6 and 7 years after Jackson's purchase, being mined upon one quarter section, and the town of El Moro covered 30 or 40 acres, comprising 20 to 25 buildings, erected by various individuals, to whom the company had sold lots, in accordance with a regular survey and map of the town-site. The entire value of the mine and coke improvements was estimated to be about \$250,000. The property was used by the company in connection with works which they had established at South Pueblo for the manufacture of iron and steel, on which there had been an expenditure of from one to two millions of dollars, the coal and coke necessary for carrying on which was obtained from the coal mines on part of the premises in dispute. As against interests of this magnitude and value vested upon a claim of title, the good faith of which on the part of the defendants is absolutely unimpeached, the proof of a fraud which renders their title absolutely void should be stronger than the legal presumptions on which it may rightfully rest.

It is urged in argument by the solicitor general that this case cannot be distinguished from that of *Moffat v. U. S.*, 112 U. S. 24, 5 Sup. Ct. 10. The two cases are undoubtedly similar in their general aspects, but, nevertheless, differ in some particulars most material to the decision. It is stated in the report of the case cited that "the testimony taken fully established the truth of the allegations and charges, except as to the knowledge by Moffat and Carr of the alleged frauds." The charges proven, or to be taken as proven, therefore, as set forth in the bill, were that the title papers in the case were manufactured by a clerk in the office of the receiver, and that the receiver was also the owner of the agricultural college scrip used to pay for the lands located, and that, for the purpose of locating the land with it in the name of Quinlan, the register and receiver had inserted in a blank indorsement his fictitious name and residence, and in that name had located the scrip on the land, there being no such person, nor any settlement and improvement on the land; and that the duplicate certificate on which the patent issued was presented to the general land-office by the defendant himself, who was thus brought into direct connection with the officers who had committed the fraud, and with the transaction before the issue of the patent. In that case *Moffat* did not offer his deed in evidence, was not examined as a witness, and attempted no proof either of his own innocence, or of the payment of value, but stood without explanation as to, who his immediate grantors were, or how he came in contact with them. The receiver was examined as a witness, but wholly failed to meet the charges alleged against him. There was further proof tending to show that the acknowledgments of the deeds to *Moffat* had been taken without identification of the grantors from whom *Moffat* received his deeds directly, and in respect to whom he must have had some knowledge. These circumstances, in our opinion, clearly distinguish that case from the present one.

There is, however, another ground on which it is contended by the government that the patents described in the bill are void. It is alleged that the lands in controversy were not subject to settlement and sale under the pre-emption laws, being "known mines" within the description of those laws. The act of September 4, 1841 (5 Stat. 455, c. 16, § 10), provided that no pre-emption entry should be made on "lands on which are situated any known salines or mines." By the act of July 1, 1864 (13 Stat. 343, c. 205, § 1), it is enacted "that where any tracts embracing coal-beds or coal-fields constituting portions of the public domain, and which as 'mines' are excluded from the pre-emption act of 1841, and which under past legislation are not liable to ordinary private entry, it shall and may be lawful for the president to cause such tracts, in suitable legal subdivisions, to be offered at

public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre; and any lands not thus disposed of shall thereafter be liable to private entry at said minimum."

The language of the pre-emption act of 1841 is preserved in section 2258, Rev. St. The act of 1864 and its supplemental act of March 3, 1865 (13 Stat. 529, c. 107), were substantially re-enacted by the act of March 3, 1873 (17 Stat. 607, c. 279), now embodied in section 2347, Rev. St., and the sections immediately following. The force and meaning of the original legislation remains unchanged. The subsequent provisions relate to the classification and terms and mode of entry and sale of the coal lands excluded from pre-emption by the laws on that subject. In reference to coal lands, which are noted on public surveys and plats as such, of course it is not to be disputed that their character is thereby made known so as to withdraw them from entry under the pre-emption and homestead acts. Where this is not done it remains, as in the present case, to determine how the character of the lands is to be ascertained, so that they may be classified as those "on which are situated any known salines or mines."

It is argued by the solicitor general, upon the facts as disclosed by the evidence in this record, that the lands covered by these patents embraced "known mines" or coal, and that, as such lands are expressly excepted out of the pre-emption laws, the patents issued therefor were void for want of power on the part of the officer to issue them, as decided in *Polk v. Wendall*, 9 Cranch, 87; *Minter v. Crommelin*, 18 How. 87; *Reichart v. Felps*, 6 Wall. 160; *Morton v. Nebraska*, 21 Wall. 660. In the last-named case, *Morton v. Nebraska*, it was said (page 674): "The salines in this case were not hidden as mines often are, but were so incrustated with salt that they resembled 'snow-covered lakes,' and were consequently not subject to pre-emption." In *McLaughlin v. U. S.*, 107 U. S. 526, 2 Sup. Ct. 802, the decree of the circuit court canceling the patent, on the ground that it purported to convey lands as part of a railroad grant, which were excepted therefrom as mineral lands, was affirmed. The court say (page 528): "It is satisfactorily proven, as we think, that cinnabar, the mineral which carries quicksilver, was found there as early as 1863; that a man named Powell resided on the land, and mined this cinnabar, at that time, and in 1866 established some form of reduction-works there; that these were on the ground when application for the patent was made by the defendant *McLaughlin*, as agent of the Western Pacific Railroad Company, and that these facts were known to him. He is not, therefore, an innocent purchaser." See *Railroad Co. v. U. S.*, 108 U. S. 510, 2 Sup. Ct. 802.

In the case of *Mullan v. U. S.*, 118 U. S. 271, 6 Sup. Ct. 1041, after referring to the acts of congress above recited, the court, speaking of the act of July 1, 1864, say (page 277, 118 U. S., and page 1041, 6 Sup. Ct.): "This is clearly a legislative declaration that 'known' coal lands were mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of congress was clearly manifested. Whatever doubt there may be as to the effect of this declaration on past transactions, it is clear that, after it was made, coal lands were to be treated as mineral lands. That the land now in dispute was 'known' coal land at the time it was selected no one can doubt. It had been worked as a mine for many years before, and it had upon its surface all the appliances necessary for reaching, taking out, and delivering the coal. That *Barnard* knew what it was when he asked for its location for his use is absolutely certain, because he was one of the agents of the coal company at the time, and undoubtedly acted in its behalf in all that he did. If *Mullan* and *Avery* were ignorant of the fact when they acquired their respective interests in the property, it was because they willfully shut their eyes to what was going on around them, and purposely kept themselves in ignorance of notorious facts. But the evidence satisfies us entirely that they were not ignorant."

It will thus be seen that, so far as the decisions of this court have heretofore gone, no lands have been held to be "known mines" unless at the time the rights of the purchaser accrued there was upon the ground an actual and opened mine, which had been worked, or was capable of being worked.

In the case of *Deffebach v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, the legislation on the subject was reviewed at length. It was there held that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such land, except in the states of Michigan, Wisconsin, Minnesota, Missouri, and Kansas. The court say (page 404, 115 U. S., and page 95, 6 Sup. Ct.): "We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral,' in the sense of the statute, is applicable. * * * We also say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land in which years afterwards rich deposits of mineral may be

discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler, and patented by the government, under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore use the term 'known to be valuable at the time of sale,' to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

It is not sufficient, in our opinion, to constitute "known mines" of coal, within the meaning of the statute, that there should merely be indications of coal-beds or coal-fields of greater or less extent, and of greater or less value, as shown by out-croppings. The act of 1864 evidently contemplates a distinction between coal-beds or coal-fields excluded from the pre-emption act of 1841 as "known mines," and other coal-beds or coal-fields not coming within that description. We hold, therefore, that to constitute the exemption contemplated by the pre-emption act under the head of "known mines" there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions ex-

isting at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual "known mines" capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed. In the present case, the testimony, in our opinion, does not justify us in finding that at the time Jackson acquired his title there were upon any part of the premises in controversy any "known mines" of coal, in the sense of the statute.

For these reasons the decree of the circuit court is reversed, and the cause remanded, with a direction to dismiss the bill; and it is so ordered.

LAKE ONTARIO NAT. BANK v. JUDSON.
(25 N. E. 367, 122 N. Y. 278.)

Court of Appeals of New York, Second Division. Oct. 7, 1890.

Appeal from supreme court, general term, fourth department.

The action was brought to recover the amount of four promissory notes, which by the complaint the plaintiff alleged were made by the defendant, payable to the order of E. M. Fort, delivered to the payee, and by him indorsed and transferred to the plaintiff. And the plaintiff also thereby alleged that the defendant was indebted to it, in a sum stated, for money advanced on his checks drawn upon the plaintiff for an amount in excess of his deposits there. The defendant by his answer alleged that he and Fort purchased of the plaintiff some canal-boats; that they were induced to make the purchase by the warranty of the plaintiff, particularly specified, and gave for them their joint notes; that, afterwards, the plaintiff took up those notes, and the makers gave their individual notes for their respective interests in the purchase to the plaintiff, which notes were received by the plaintiff "in place of and in payment of said first-mentioned notes, and which notes last given are the notes and the renewal thereof set forth in the complaint." The defendant alleged a breach of this warranty and damages as the consequence, which he claimed should be allowed to him. He also alleged by way of counter-claim that the plaintiff was indebted to him in a further sum for services performed by him for and at the request of the plaintiff, for which, with the amount of damages for the alleged breach of warranty, he demanded judgment. And for further answer, he denied the complaint, and each and every allegation therein contained, except as therein before admitted. The plaintiff by reply put in issue the new matter of the answer constituting the alleged counter-claims. The trial court directed judgment for the amount of the notes and of the overdraft mentioned in the complaint.

H. C. Benedict and Miller, Lewis & Judson, for appellant. *S. C. Huntington, Jr.*, for respondent.

BRADLEY, J., (after stating the facts as above.) The contest on the trial mainly had relation to the defendant's alleged counter-claim for services, upon which claim he gave evidence to the effect that they were performed by him pursuant to an agreement with the plaintiff, by which the latter undertook to pay him \$2,500, of which \$160 had been paid. This claim, and the evidence on the part of the defendant tending to support it, were disputed by the evidence on the part of the plaintiff, and the trial court found the facts against the defendant. For the purpose of this review, the findings and determination of the court below must be deemed conclusive. Upon the trial, the question as to which party was entitled to the closing argument was raised. The court held that the plaintiff had the right to it, and the defendant excepted.

The rule that the party having the affirmative of the issues in an action shall have the opportunity to make the opening and closing presentation of his case is deemed founded upon a substantial right, the denial of which is error. *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. Rep. 489. In its application to trials by jury, it has ordinarily more practical importance than in those before the court without a jury, and before referees. If it appears that a party could not have been prejudiced by the failure of the court to observe the rule, the error would not be available; and in trials by the court without jury, or before referees, that question would be dependent upon the circumstances of each case. In the present case, the view of the court evidently was that the affirmative of the entire issues was not with the defendant; and that is the question presented for consideration. The denial by the defendant in his answer, except as therein admitted, of each and every allegation of the complaint, put in issue any material allegation of the complaint not distinctly admitted by the answer. *Allis v. Leonard*, 46 N. Y. 688; *Calhoun v. Hallen*, 25 Hun, 155. The charge in the complaint, in due form, of the indebtedness of the defendant to the plaintiff for the amount advanced to him upon his check, in excess of the balance of his account with the plaintiff, was not admitted by the answer, but was controverted by such denial. It appears that after the trial had been moved, and the plaintiff by its counsel had, by statement of it, made the opening of the case to the court, the defendant orally admitted the count of the complaint alleging the overdraft. The plaintiff then proceeded to prove the signature of the defendant to the notes, and the indorsement by the payee, and rested. It seems that the plaintiff deemed it necessary to make this proof, perhaps for the reason that the allegation in the answer of the making and delivery of the notes by the defendant to the plaintiff was treated as not sufficient upon which to rest, coupled as it was with the further allegation of their consideration as the foundation of the counter-claim, alleged to have arisen out of a warranty and its breach. The apprehension may have been that the adoption of the admission in the answer of the making and delivery of the notes could not be severed from what was alleged as the consideration out of which they arose, within the principle that when an admission of a fact is made in connection with that of another, which nullifies the effect of it, the entire statement must be taken together. *Gildersleeve v. Landon*, 73 N. Y. 609. Assuming, as we do, that such rule of construction was not applicable to this admission in the answer, and that no proof of the execution or indorsement of the notes was necessary, the question arises whether the oral admissions at the trial of the plaintiff's claim for the amount of the defendant's overdraft entitled him to the right of closing the argument on the final submission of the case to the court for determination. And that depends upon the question whether the affirmative of the issue, with a view to such right, must be as-

certained from the pleadings, or may arise from admissions orally made at the trial. The issues to be tried can be ascertained only by reference to the pleadings; and they must govern so far as relates to the right of the parties to open the case at the beginning and conclude the argument at the close of the trial. When the parties go to trial, they respectively assume the burden of establishing that which they have affirmatively alleged as a cause of action or counter-claim, if it is controverted by allegation sufficient to put it in issue. The admission of a fact upon the trial is evidence merely. It may obviate the necessity of further trial of the issue to which it relates, but does not change it as represented by the pleadings. That can be done by amendment only. It is true the admission made at the trial may reduce the controversy to matter as to which the affirmative is with the defendant. Such would be the effect of evidence of any character undisputed and indisputable of the facts constituting the alleged cause of action. The right under consideration does not depend simply upon the admission of those facts unless they are admitted or uncontroverted by the answer; otherwise it is evidence only. There is no occasion to extend the rule so as to give effect, for such purpose, to concessions at the trial. This might lead to the adoption of such a course, when further dispute of the facts upon which a plaintiff relies may appear hopeless to a defendant, for the purpose of obtaining the right of closing the trial. There is no apparent reason for applying such rule to any one more than to any other stage of the trial.

The defendant who may wish to take the right of opening and concluding the trial must frame his pleading with that view, and so as to present no issue upon any allegation of the complaint essential to the plaintiff's alleged cause of action. If the defendant fail to do that, no matter how little proof the remaining issues require, or how easily or in what manner it may be established by evidence, the right of the plaintiff to open and close the case is not denied to him. *Mercer v. Whall*, 5 Adol. & E. (N. S.) 447. The test is whether, without any proof, the plaintiff upon the pleadings is entitled to recover upon all the causes of action alleged in his complaint. If he is, and the defendant alleges any counterclaim controverted by the plaintiff's pleading, or any affirmative matter of defense in avoidance of the plaintiff's alleged cause of action, and which is the subject of trial, the defendant has the right to open and close; otherwise not. *Huntington v. Conkey*, 33 Barb. 218; *Elwell v. Chamberlin*, 31 N. Y. 614; *Murray v. Insurance Co.*, 85 N. Y. 236. The production of the note sued on and the computation of interest proved are not embraced in the facts essential to the cause of action. If the defendant, by permission of the court, had stricken out the denial in his answer, or amended it by inserting the admission orally made, a different question would have been presented at the trial upon the claim of the defendant to the right to conclude it. No other question requires the expression of consideration. The judgment should be affirmed. All concur, except FOLLETT, C. J., not sitting.

ST. LOUIS, I. M. & S. RY. CO. v. TAYLOR.

(20 S. W. 1083, 57 Ark. 136.)

Supreme Court of Arkansas. Jan. 7, 1893.

Appeal from circuit court, Jefferson county; John M. Elliott, Judge.

Action by E. S. Taylor against the St. Louis, Iron Mountain & Southern Railway Company to recover the value of a mule killed through defendant's alleged negligence. Judgment for plaintiff. Defendant appeals. Affirmed.

In proving ownership of the mule for which damages were sought to be recovered, plaintiff was asked, "How long had you owned the mule?" and he answered, "I think about a month or two." When asked how much he originally paid for the mule, he said: "I did not pay for him until after he was killed. I bought the mule from a party. I do not remember his name. After he had been killed, I then paid for the mule." He also testified that he had possession of the mule on trial. He had not paid for it. "As soon as the mule was killed, and the man wanted his money, I gave him \$90, and promised to pay him the balance as soon as I collected it."

Dodge & Johnson, for appellant. Bell & Bridges, for appellee.

COCKRILL, C. J. 1. Construing the evidence most strongly in favor of the appellant, Taylor had a special property in the animal killed, which empowered him to recover its full value. *Railway Co. v. Biggs*, 50 Ark. 169, 6 S. W. 724. No prejudice results to the railway, therefore, in permitting him to maintain the action.

2. The statute declares that railroads operated in this state shall be responsible for all damages done or caused by the running of their trains. *Mansf. Dig. § 5537*. In a suit against a railway company to recover for an injury done to property by a running engine or train, this statute casts upon the company the burden of showing due care on its part. That is not the express provision of the statute, but it is the nearest approach to the legislative intent that the court was able to extract from it, consistent with the constitution. *Railway Co. v. Payne*, 33 Ark. 816; *Tilley v. Railway Co.*, 49 Ark. 535, 542, 6 S. W. 8. The statute has found application in our courts mainly in cases where live stock, when running at large, has been injured by railway trains; and we have ruled many times that proof of injury by the railway in such cases raises a presumption of negligence against the company. There is nothing in the terms of the statute to warrant a change in the construction of it when the proof shows that an animal was under the control of its owner or his agent at the time of the injury. The statutory policy of casting the burden of proof on the railway to show care when the injury is

proved may have had its origin in the fact that the company's employes are most likely to know the facts, while the owner of the injured property is ignorant of them; but the enactment does not limit the operation of the rule to that state of facts. The argument that the party having the best means of information should bear the burden of proof might well be addressed to the policy of enacting such a statute, but not to its construction when its language will not admit of the distinction. When the proof shows that the act of the owner, having control of the animal when injured, has contributed to the injury, the statute is inoperative, because the contributory negligence of the owner would bar a recovery. Thus, if the plaintiff here, in developing his case, had shown that he was wrongfully using the track of the railway as a highway for his mule and vehicle, and had shown no other fact save that the property was injured by the defendant's moving train, he would not have established a *prima facie* case under the statute, because, upon the case thus proved, he could recover only for a wanton injury, and the statute raises no presumption of wantonness. *Railway Co. v. Monday*, 49 Ark. 257, 264, 265, 4 S. W. 782. But in this case the plaintiff adduced evidence tending to show that at the time of the injury he was using the right of way between the main and side tracks by the license and invitation of the company. If that was true, he was not a trespasser, but was there as of right, and the company owed him the duty to observe ordinary care to preserve his property from injury. The fact of injury is, therefore, evidence of the want of such care; that is, of negligence. The charge to that effect was not erroneous. The court's charge upon the subject of contributory negligence by the owner was full, and it was favorable to the defendant. The jury found, upon conflicting testimony, that he was not guilty of contributory negligence, and that the railway did not use due care. The verdict is conclusive.

3. The party having the "burden of proof in the whole action" has the right to open and conclude the argument. *Mansf. Dig. § 5131*. Such a burden lies on the party who would be defeated if no evidence were given on either side. *Id. § 2871*. Upon the defendant's admission of the killing only, if the plaintiff could have recovered at all, his recovery would have been confined to nominal damages, because the defendant specifically denied the extent of his injury. But a recovery of substantial damages, and not of the costs only, was what the plaintiff sought. The burden of proving the extent of his injury remained upon him throughout, and gave him the right to begin and reply. *Railway Co. v. Rhea*, 44 Ark. 258, 264; 1 *Thomp. Trials*, §§ 228, 229. No other objection is urged by the appellant. Finding no error, the judgment is affirmed.

CRABTREE v. ATCHISON et al.

(20 S. W. 260, 93 Ky. 338.)

Court of Appeals of Kentucky. Oct. 1, 1892.

Appeal from circuit court, Daviess county.

Action by J. D. Atchison and others against Moses Crabtree. Judgment for plaintiffs. Defendant appeals. Reversed.

Sweeney, Ellis & Sweeney, for appellant. Weir, Weir & Walker, for appellees.

BENNETT, J. The appellant executed to J. McDanrich & Co. a promissory note for \$102.60. McDanrich & Co. assigned the note, before its maturity, to the appellees. They brought suit on it. The appellant answered that the note was obtained from him by the fraud of the payees, and that it was without consideration, having been executed for a lightning rod that was utterly worthless. The appellees, replying, traversed these allegations. They further alleged that when the appellant executed and delivered the note to McDanrich & Co. he executed and delivered to them two writings. The one deemed material to the question at issue is as follows: "To all whom it may concern: This is to certify that a note executed by me to J. McDanrich & Co., for \$102.60, is a bona fide debt against me. There is no offset, discount, or defense against the same, and the same is good against me for the full amount thereof, and will be paid to the said J. McDanrich & Co., or to such persons as they may assign said note to." (Signed, etc.) The appellees further alleged that they purchased said note for value, and without notice of the alleged fraud or want of consideration, and that at the time of the negotiation for the note the writing, supra, was exhibited to them, and they purchased the note upon the faith of the assurances therein contained. The appellant rejoined, denying that appellees knew of the contents of said writing, or that they purchased the note upon the faith of the assurances therein contained. On the trial of the case the lower court ruled that the burden was on the appellees; consequently they were entitled to conclude the argument. The appellees obtained judgment on the note, and the appellant has appealed.

Under the instructions of the court, to which there is no serious objection, the jury was authorized from the evidence to find that the said writing was exhibited to appellees at the time they purchased the note, and that they purchased it upon the faith of the assurances therein contained. But it does not appear that the appellant issued and delivered the writing with the purpose of defrauding or deceiving the appellees, or any one else. So the question is, there being no actual fraudulent or deceitful purpose on the part of the appellant in issuing and delivering said paper, does the doctrine of estoppel apply in favor of the appellees, they having purchased said note for value, and

without notice of the alleged infirmities, and upon the faith of the assurances contained in said writing? In a case like this, where a person has made certain assurances upon which he intends third persons to rely as true in contracting in reference to the subject-matter of the assurances, and upon which they do rely as true in making such contracts, and but for which they would not have thus contracted, and the denial of the truth of the assurances would be injurious to the contractual rights of such person, the person giving the assurances is estopped from denying their truth as to such persons. The fact, in a case like this, that the person made the assurances in good faith, and without design to defraud, cannot relieve or avoid the doctrine of estoppel, because he intended the other party to rely upon the truth of the assurances, and he did rely upon them in contracting, and would not have thus contracted but for such reliance; and it would be a fraud upon him to allow the person to deny the truth of them to the detriment of the other party. See *Rudd v. Mathews*, 79 Ky. 479. The writing delivered to the payees of the note, and exhibited to the appellees by the payees to induce them to purchase it, and upon the assurances of which they relied in making the purchase, was equivalent to personal assurances made to the appellees by the appellant, face to face, to induce them to make the purchase, and upon which they relied in making the purchase. But, as said, the court held the burden to be upon the appellees; consequently it allowed them to open and conclude the argument. The appellant complains of that ruling. We have decided that an error in that particular is a reversible error. The Civil Code, § 526, provides as follows: "The burden of proof in the whole action lies on the party who would be defeated if no evidence was given on either side." The note sued on being prima facie evidence (the signature being admitted) that the payor was indebted according to its terms, the burden was upon him to establish the allegations of fraud and want of consideration. Those allegations being traversed, and if no proof was offered establishing them, the appellees would be entitled to judgment on the note; hence the burden thus far was on the appellant to establish the allegations of fraud and want of consideration; and, failing to establish that issue, the appellees would be entitled to judgment for the full amount of the note. The plea of estoppel in event of such failure would cut no figure, for, the proof having failed on the issue of fraud and no consideration, the appellees would be entitled to judgment on the note; so, notwithstanding, the appellees, in case the plea of fraud and no consideration was established, would, in order to avoid the effect of it, be compelled to establish by proof their plea of estoppel, yet, in case there was no proof offered, they would be entitled

to judgment for their demand. Hence, as judgment would have been rendered against the appellant in case no proof had been offered, the burden was upon him, and he was | entitled to conclude the argument. For that reason the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

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DISTRICT OF COLUMBIA v. ARMES.

(2 Sup. Ct. 840, 107 U. S. 519.)

Supreme Court of the United States. May 7, 1883.

In error to the supreme court of the District of Columbia.

A. G. Riddle, for plaintiff in error. S. Shellabarger, A. A. Birney, and C. H. Armes, for defendant in error.

Mr. Justice FIELD delivered the opinion of the court.

This was an action to recover damages for injuries received by the plaintiff's intestate, Du Bose, from a fall caused by a defective sidewalk in the city of Washington. In 1873 the board of public works of the city caused the grade of the carriage-way of Thirteenth street, between F and G streets, to be lowered several feet. The distance between the curbstone of the carriage-way and the line of the adjacent building was 36 feet. At the time the accident to the deceased occurred, this portion of the street—sidewalk it may be termed, to designate it from the carriage-way, although only a part of it is given up to foot passengers—was, for 48 feet north of F street, lowered in its whole width to the same grade as the carriage-way. But, for some distance beyond that point, only 12 feet of the sidewalk was cut down, thus leaving an abrupt descent of about 2 feet at a distance of 12 feet from the curb. At this descent—from the elevated to the lowered part of the sidewalk—there were 3 steps, but the place was not guarded either at its side or end. Nothing was placed to warn foot passengers of the danger.

On the night of February 21, 1877, Du Bose, a contract surgeon of the United States army, while walking down Thirteenth street, towards F street, fell down this descent, and, striking upon his knees, received a concussion which injured his spine and produced partial paralysis, resulting in the impairment of his mind and ultimately in his death, which occurred since the trial below. The present action was for the injury thus sustained. He was himself a witness, and it appeared from his testimony that his mind was feeble. His statement was not always as direct and clear as would be expected from a man in the full vigor of his mind. Still it was not incoherent, nor unintelligible, but evinced a full knowledge of the matters in relation to which he was testifying. A physician of the government hospital for the insane, to which the deceased was taken two years afterwards, testified that he was affected with acute melancholy; that sometimes it was impossible to get a word from him; that his memory was impaired, but that he was able to make a substantially correct statement of facts which transpired before the injury took place, though, from the impairment of his memory, he might

leave out some important part; that there would be some confusion of ideas in his mind; and that he should not be held responsible for any criminal act. A physician of the Freedmen's Hospital, in which the deceased was at one time a patient after his injuries, testified to a more deranged condition of his mind, and that he was, when there in June, 1879, insane. He had attempted to commit suicide, and had stuck a fork into his neck several times. Upon this, and other testimony of similar import, and the feebleness exhibited by the deceased on the stand, the counsel for the city requested the court to withdraw his testimony from the jury, on the ground that his mental faculties were so far impaired as to render him incompetent to testify as a witness. This the court refused to do, but instructed the jury that his testimony must be taken with some allowance, considering his condition of mind and his incapacity to remember all the circumstances which might throw some light on his present condition. This refusal and ruling of the court constitute the first error assigned.

The ruling of the court and its instruction to the jury were entirely correct. It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. His incompetency on that ground, like incompetency for any other cause, must be passed upon by the court, and to aid its judgment evidence of his condition is admissible. But lunacy or insanity assumes so many forms, and is so often partial in its extent, being frequently confined to particular subjects, while there is full intelligence on others, that the power of the court is to be exercised with the greatest caution. The books are full of cases where persons showing mental derangement on some subjects evince a high degree of intelligence and wisdom on others. The existence of partial insanity does not unfit individuals so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard. In a case in the prerogative court of Canterbury, counsel stated that partial insanity was unknown to the law of England; but the court replied that if by this was meant that the law never deems a person both sane and insane at one and the same time, upon one and the same subject, the assertion was a truism; and added: "If, by that position, it be meant and intended that the law of England never deems a party both sane and insane at different times upon the same subject, and both sane and insane at the same time upon different subjects, there can scarcely be a position more destitute of legal foundation; or, rather, there can scarcely be one more adverse to the stream and current of legal authority." *Dew v. Clark*, 3 Add. Ecc. 79, 94.

The general rule, therefore, is that a lunatic or a person affected with insanity is

admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity. Such was the decision of the court of criminal appeal in England, in the case of *Reg. v. Hill*, 5 Cox, Cr. Cas. 259. There the prisoner had been convicted of manslaughter; and on the trial a witness had been admitted whose incompetency was urged on the ground of alleged insanity. He was a patient in a lunatic asylum, under the delusion that he had a number of spirits about him which were continually talking to him, but the medical superintendent testified that he was capable of giving an account of any transaction that happened before his eyes; that he had always found him so; and that it was solely with reference to the delusion about the spirits that he considered him a lunatic. The witness himself was called, and he testified as follows: "I am fully aware I have a spirit, and 20,000 of them. They are not all mine. I must inquire. I can where I am. I know which are mine. Those that ascend from my stomach and my head, and also those in my ears. I don't know how many they are. The flesh creates spirits by the palpitation of the nerves and the rheumatics. All are now in my body and around my head. They speak to me incessantly, particularly at night. That spirits are immortal, I am taught by my religion from my childhood. No matter how faith goes, all live after my death, those that belong to me and those that do not." After much more of this kind of talk he added: "They speak to me instantly; they are speaking to me now; they are not separate from me; they are around me speaking to me now; but I can't be a spirit, for I am flesh and blood. They can go in and out through walls and places which I cannot." He also stated his opinion of what it was to take an oath: "When I swear," he said, "I appeal to the Almighty. It is perjury, the breaking of a lawful oath, or taking an unlawful one; he that does it will go to hell for all eternity." He was then sworn, and gave a perfectly collected and rational account of a transaction which he declared that he had witnessed. He was in some doubt as to the day of the week on which it took place, and on cross-examination said: "These creatures insist upon it, it was Tuesday night, and I think it was Monday;" whereupon he was asked: "Is what you have told us, what the spirits told you, or what you recollected without the spirits?" And he said: "No; the spirits assist me in speaking of the date; I thought it was Monday, and they told me it was

Christmas eve, Tuesday; but I was an eye-witness, an ocular witness, to the fall to the ground." The question was reserved for the opinion of the court whether this witness was competent, and after a very elaborate discussion of the subject it was held that he was. Chief Justice Campbell said that he entertained no doubt that the rule laid down by Baron Parke, in an unreported case which had been referred to, was correct, that wherever a delusion of an insane character exists in any person who is called as a witness, it is for the judge to determine whether the person so called has a sufficient sense of religion in his mind and a sufficient understanding of the nature of an oath, and it is for the jury to decide what amount of credit they will give to his testimony. "Various authorities," said the chief justice, "have been referred to, which lay down the law that a person non compos mentis is not an admissible witness; but in what sense is the expression 'non compos mentis' employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath, and capable of giving very material evidence upon the subject-matter under consideration." And the chief justice added: "The proper test must always be, does the lunatic understand what he is saying; and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest." He also observed that in a lunatic asylum the patients are often the only witnesses of outrages upon themselves and others, and there would be impunity for offenses committed in such places if the only persons who can give information are not to be heard. Baron Alderson, Justice Coleridge, Baron Platt, and Justice Talfourd agreed with the chief justice, the latter observing that "if the proposition that a person suffering under an insane delusion cannot be a witness were maintained to the fullest extent, every man subject to the most innocent, unreal fancy would be excluded. Martin Luther believed that he had a personal conflict with the devil. Dr. Johnson was persuaded that he had heard his mother speak to him after death. In every case the judge must determine according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case, there may be the most disastrous consequences." This case is also found in *Denison & P. Cr. Cas. 254*, where Lord Campbell is reported to have said that the rule contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him. The doctrine of this

decision has not been overruled, that we are aware of, and it entirely disposes of the question raised here.

On the trial, a member of the metropolitan police, who saw the deceased fall on the sidewalk and went to his assistance, was asked, after testifying to the accident, whether, while he was on his beat, other accidents had happened at that place. The court allowed the question, against the objection of the city's counsel, for the purpose of showing the condition of the street, and the liability of other persons to fall there. The witness answered that he had seen persons stumble over there. He remembered sending home in a hack a woman who had fallen there, and had seen as many as five persons fall there.

The admission of this testimony is now urged as error, the point of the objection being that it tended to introduce collateral issues and thus mislead the jury from the matter directly in controversy. Were such the case the objection would be tenable, but no dispute was made as to these accidents, no question was raised as to the extent of the injuries received, no point was made upon them, no recovery was sought by reason of them, nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character—at least, it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject.

Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities.

In *Quinlan v. City of Utica*, 11 Hun, 217, which was before the supreme court of New York, in an action to recover damages for injuries sustained by the plaintiff through the neglect of the city to repair its sidewalk, he was allowed to show that while it was out of repair other persons had slipped and fallen on the walk where he was injured. It

was objected that the testimony presented new issues which the defendant could not be prepared to meet, but the court said: "In one sense every item of testimony material to the main issue introduces a new issue; that is to say, it calls for a reply. In no other sense did the testimony in question make a new issue. Its only importance was that it bore upon the main issue, and all legitimate testimony bearing upon that issue, the defendant was required to be prepared for." This case was affirmed by the court of appeals of New York, all the judges concurring, except one, who was absent. 74 N. Y. 603.

In an action against the city of Chicago, to recover damages resulting from the death of a person who in the night stepped off an approach to a bridge while it was swinging around to enable a vessel to pass, and was drowned,—it being alleged that the accident happened by reason of the neglect of the city to supply sufficient lights to enable persons to avoid such dangers,—the supreme court of Illinois held that it was competent for the plaintiff to prove that another person had, under the same circumstances, met with a similar accident. *City of Chicago v. Powers*, 42 Ill. 169. To the objection that the evidence was inadmissible, the court said:

"The action was based upon the negligence of the city in failing to keep the bridge properly lighted. If another person had met with a similar fate at the same place, and from a like cause, it would tend to show a knowledge on the part of the city that there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide proper means for the protection of persons crossing on the bridge. As it tended to prove this fact it was admissible; and if the appellants had desired to guard against its improper application by the jury, they should have asked an instruction limiting it to its legitimate purpose."

Other cases to the same general purport might be cited. See *City of Augusta v. Haffers*, 61 Ga. 48; *House v. Metcalf*, 27 Conn. 630; *Calkins v. City of Hartford*, 33 Conn. 57; *Darling v. Westmoreland*, 52 N. H. 401; *Hill v. Portland & R. R. Co.*, 55 Me. 439; *Kent v. Town of Lincoln*, 32 Vt. 591; *City of Delphi v. Lowery*, 74 Ind. 520. The above, however, are sufficient to sustain the action of the court below in admitting the testimony to which objection was taken. Judgment affirmed.

HUGHES v. DETROIT, G. H. & M. RY.
CO.¹

(31 N. W. 603, 65 Mich. 10.)

Supreme Court of Michigan. Feb. 10, 1887.

Error to superior court of Detroit.

Action against a railroad company to recover for personal injuries. Judgment for plaintiff. Defendant appeals.

Seth E. Engle, for plaintiff. E. W. Meddaugh, for defendant and appellant.

CAMPBELL, C. J. Plaintiff, a little colored boy, who is now between six and seven years old, and was, when injured, five years old or under, recovered judgment in the superior court of Detroit for personal injuries causing the loss of a leg and some other damage. In July, 1884, towards the close of the day, but during daylight, according to the claim of his declaration, he was on the front of a switching locomotive which was making up and distributing freight trains, and standing upon a plank step used for switchmen and brakemen to stand upon in their yard-work, and, as he asserts, was thrown off by a sudden start or a sudden stop, and run over. The negligence alleged was the failure of the trainmen to put him off before moving, and the rapid action in starting and stopping. Other facts were set up concerning the condition of the yard in which the accident happened, which ran from Hastings street across a block, and the use of it as a place of pasture by children, and some similar matters, all of which, although gone into on the trial, were finally ruled to be improper by the judge in his charge. This final ruling was in accordance with the decision of this court in *Chicago & N. W. R. Co. v. Smith*, 46 Mich. 504, 9 N. W. 830, concerning such premises, where it was held, in a very similar case in all its circumstances, that the company could not be held, under such circumstances, for anything less than wanton and gross negligence involving reckless misconduct.

Under the charge, as already given, the jury were directed not to find for plaintiff unless the engineer actually saw the plaintiff on the foot-board. If so, the court held he should not have started the train while the boy was on it, but should have ordered him off; and, in giving this charge, the court said it was conceded that the boy was on the foot-board, and assumed the boy said the engineer saw him before starting. It was not disputed, but admitted on the argument in this court, that, if the engineer actually saw the boy on the foot-board before moving, he would be bound to use efficient care to prevent injury to him; but it is denied that he was on the foot-board, or, if so, was seen by the engineer, or any one else, in that position. The fact that the boy himself is the only wit-

ness who says the engineer saw him renders another question important, which is how far his testimony was admissible.

Upon examining the testimony, we find that, while there are witnesses for plaintiff who swear to his being on the foot-board, they do not agree as to the circumstances or cause of his being thrown from the board. On the part of the defense there is testimony which is not consistent with his being there, as well as positive testimony that he was not seen if there. The declaration does not aver that he was seen, but merely that he might have been seen with proper diligence, but it does aver he was on the board and thrown off. There was conflicting testimony as to the likelihood or possibility of seeing him on the board. He himself says he ran back and forth over it while the engine was not moving, and finally got on it just before starting, and then stayed on till he fell off. He also says he faced the engine, while the other testimony would not so indicate. All of this shows the great importance of this particular fact, and the danger of assuming it when the testimony conflicted. So it was equally important to know whether, if seen at all, he was seen before starting, as the duty to keep off a child entirely could not be quite the same as the duty which would arise from seeing him already on a moving train. Most of the testimony indicates that there was nothing unusual in the running or stopping of the train after it started. This theory was not laid before the jury so as to call their attention to its significance.

The boy's own testimony as to how he fell off is not quite the same in the direct as on the cross-examination. On the direct, the impression he gives is that he was thrown off by a sudden starting and jerk. On the cross-examination he says he was carried forward, and in no other direction, with the engine, until near the switch, and then fell off close by the switch. Rosa Bushey, one of his witnesses, on the other hand, says the engine went back with him towards Hastings street before taking him east to the switch. Tean, another of his witnesses, swore his back was towards the engineer while he was standing on the board, and that his hands were under the hand-rail. The testimony was by no means uniform upon the important matters on which this charge bore.

The charge seemed to go upon the idea that the plaintiff's account was the one to be chiefly acted on by the jury, in connection with his testimony concerning the engineer, and there was no other testimony which covered that matter directly. He does not swear positively that the engineer saw him, but his testimony undoubtedly tends that way, but, when all compared, leaves the time and circumstances of such seeing in doubt. Without it, as the court substantially charged, there was no case for the jury. In connection with this there was testimony of the plaintiff himself that the engineer, when he

¹ Dissenting opinion of Morse, J., omitted.

saw him, told the fireman not to ring the bell until the little fellow got off, and there is no testimony that after this warning the boy showed himself, if he did at all, to the engineer. The court committed error in treating controverted facts as undisputed, as well as in saying the plaintiff should recover if the engineer saw him, without reference to the time and circumstances of seeing him.

Passing by minor points, this makes it necessary to determine concerning the admissibility of this proof. It has been held by this court, as well as courts generally, that the fact that a child is under seven years does not create an absolute disability to testify. This was held in *McGuire v. People*, 44 Mich. 286, 6 N. W. 669, and is the doctrine of the text-books. But the authorities all agree that a child cannot testify unless capable of appreciating the obligation of his oath, if he takes an oath, or of his affirmation if that is substituted. And this is upon the ground that a witness must be under some pressure, arising out of the solemnity of the occasion, beyond the ordinary obligation of truth-telling. 1 Greenl. Ev. § 367; 1 Phil. c. 2 (C. & H.), and notes. One or the other of these methods of attestation is required of all witnesses, children or adults, and persons unsworn cannot testify unless they prefer the other form, which in this state is under the pains and penalties of perjury.

The fact that the child was to be put under oath or affirmation was not brought to his attention at all, so as to show whether he did or did not understand the bearing or effect of it. He merely said he must tell the truth, or he would go to hell; but, when asked about any other consequences, he showed entire ignorance, and only said that his mother told him the day before that he would go to hell if he did not speak the truth. This is all that he said bearing on his veracity. He was examined by counsel, and not particularly tested by the court, and the court, without making any personal examination, certifying or in any way giving an opinion that the boy understood the nature or obligation of an oath or affirmation, left it all to the jury, to be tested by the ordinary questioning and cross-questioning by counsel. This is what might, no doubt, be safe with many other persons besides children who usually tell the truth, and may have their truth substantially tested, whether sworn or not. But the law entitles parties to insist that all witnesses shall be put under some solemn obligation before testifying, and excludes witnesses who are incapable of understanding its sanction. As Mr. Starkie very well explains it, this is not done because the law imputes guilt or blame to those who do not appreciate it, but because it requires the highest attainable sanction for testimony. 1 Starkie, Ev. 22. It is not left to courts to let in everything which, in their general opinion, or in the case of the particular witness, might be safe. Neither does it rest on any particular belief.

Any one may take the oath or obligation that accords with his own opinions, but he must do the one or the other. And he must be able to comprehend it. Upon this there is no conflict in the cases. It is necessary to be left very much to the discretion of the trial judge if he undertakes to exercise that discretion, and acts upon such an examination as satisfies his own mind. He should conduct this examination as in his judgment will be effectual. It cannot safely be left to counsel to make the examination. In *McGuire's Case*, before referred to, the judge gave a careful personal examination to the child, and formed a distinct opinion of his own, founded on that examination. As the preliminary inquiry cannot be and is not under oath, there is the strongest reason for very careful action by the judge himself on his official responsibility. The cases and text-books recognize this distinctly. See 1 Greenl. Ev. §§ 367, 368, and notes; 1 Edw. Phil. Ev. 11, and notes. In England it has been held that recent teaching for the occasion is not in itself sufficient, because the knowledge thus received may not be comprehended. 1 Edw. Phil. Ev. 11; *Rex v. Williams*, 7 Car. & P. 320. A careful judicial examination is much more satisfactory than answers which may or may not be really intelligent. The child's capacity and disposition to answer correctly and cordially such questioning as may be given is of the utmost consequence, because even among mature witnesses it is not always easy to discriminate between actual knowledge and what is accepted on hearsay and influence. It is obviously necessary for the court to be satisfied that the child will be disposed to tell the truth under some sense of obligation.

In children of tender age no reasonable person would expect a complete power of discriminating between his means and sources of knowledge; and more or less undesigned coloring and miscoloration is almost inevitable. There can be no criminal responsibility in a young child, and the care used must therefore be rather in ascertaining his capacity and disposition than in impressing the terrors of the law. We are compelled to apply the law as we find it, until changed by legislation. But we are greatly impressed with the practical imperfection of the present rules. In France, and probably elsewhere, the courts refuse to administer an oath to children of tender years, and allow them to be examined without anything more than suitable cautions, leaving their statements on direct and cross-examination to be taken for what they are worth. This seems to be a sensible proceeding, and is probably quite as efficacious as our own system, and less likely to abuse. There is a proper desire in courts to receive such testimony as will throw light on the case, and there is no doubt that in practice children are often allowed to testify whose legal capacity to do so is very liberally construed. It would be better, we think, to put

their testimony on the more rational ground that it is calculated to be of some value, and capable, under a proper examination, of being reasonably well weighed for what it is worth.

The other points do not require much consideration. It is possible the instructions concerning damages were open to some criticism, but the judge appears to have desired to prevent any wild estimates, and it is not very easy to be precise concerning all the elements to be considered in such a case. The charge was intended to keep out improper consider-

ations as far as possible, and to undo some rulings made earlier in the case which were found improper. In cases like this, however, it is not possible, after argument, to undo the effect of important testimony once in, and impressed on the jury by counsel.

For the reasons given, the judgment should be reversed, and a new trial granted.

CHAMPLIN and SHERWOOD, JJ., concurred. MORSE, J., dissented.

* * * * *

STEPHENS v. BERNAYS.

(42 Fed. 488.)

District Court, E. D. Missouri, E. D. June 7, 1890.

At law.

George D. Reynolds, U. S. Dist. Atty., for plaintiff. H. A. Loevy, for defendant.

THAYER, J. The testimony of C. C. Crecilius, taken in connection with other testimony offered by the plaintiff, clearly shows that the deceased assigned his stock in the insolvent bank to Crecilius, the cashier, with intent to evade his liability as a shareholder. According to the testimony of Crecilius, the deceased had not only been advised before the sale that the bank had sustained considerable losses, but he declared at the time of the sale that his purpose in selling was to avoid his liability as a stockholder. The sale appears to have been made only two days before the bank closed its doors, and no change took place in the condition of the bank in the mean time. Crecilius gave his notes for the stock, instead of paying for the same in money; and according to his statement the notes were to be surrendered, and the sale canceled, if at the end of 60 days the deceased was then assured that the bank was all right. Crecilius himself had little or no means, at the time of the purchase, and was rendered utterly insolvent by the failure of the bank two days later. His object in making the purchase in question was to withdraw the stock from the market, and save the credit of the bank, which was then in a precarious condition. These facts, most of which were established by the testimony of Crecilius, warrant the conclusion that the pretended sale was and is voidable as to creditors of the insolvent bank, who are represented in this proceeding by the receiver. *Thomp. Liab. Stockh.* § 215, and cases cited.

A question arises, however, and was reserved at the trial, touching the competency of Crecilius to testify against the executrix concerning transactions between himself and the testator. The federal statutes provide (section 858) that—

"No witness shall be excluded * * * in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, * * * in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, * * * unless called to testify thereto by the opposite party. * * * In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in courts of the United States," etc.

The state law on the subject (section 8918, *Rev. St. Mo. 1889*) provides that—

"No person shall be disqualified as a witness in any civil suit * * * by reason of

his interest in the event of the same, as a party or otherwise: * * * provided that, in actions where one of the original parties to the contract or cause of action in issue and on trial is dead or * * * insane, the other party to such contract or cause of action shall not be admitted to testify * * * in his own favor; * * * and, where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify," etc.

The first clause of the proviso of section 8918, *supra*, as heretofore construed by the state courts, has much greater scope than the federal statute above referred to. Thus, in *Meier v. Thieman*, 90 Mo. 434, 2 S. W. 435, it was held that by the proviso in question a person was rendered incompetent to testify as to transactions with a decedent in a suit brought by his heirs, although the person tendered as a witness was not a party to the suit. The decision appears to be based on the ground that a witness, to be excluded by the state law, need not be a party to the record, but will be excluded as a witness as to all contracts or transactions between himself and a deceased person, when the witness has an interest in the result of the suit, whether he is or is not a party to the record. Hence it is important to determine, in the first instance, whether the competency of Crecilius to testify as to transactions between himself and the decedent is to be tested by federal or state law. The rule is that, where congress has legislated on the subject,—that is, has enacted a law covering the particular case,—such law must prevail in the federal courts, notwithstanding it differs from the state law. *Potter v. Bank*, 102 U. S. 165; *Insurance Co. v. Schaefer*, 94 U. S. 458; *Rice v. Martin*, 8 Fed. 476. The state laws control in determining the competency of witnesses only in cases like that of *Packet Co. v. Clough*, 20 Wall. 537, which do not fall within any provision of the federal laws.

The case at bar is clearly within the terms of section 858. The effort is to exclude Crecilius as a witness on the ground of interest; but the first clause of the section declares that interest shall be no disqualification "in any civil action," and the only exception to that rule is that mentioned in the proviso,—that a person called as witness shall not be allowed to testify as to any transactions with or statement by a decedent, if the suit is against his executor or administrator, and the witness is himself an opposing party to the suit, unless the witness is called upon to testify by the executor or administrator. The case at bar seems to be strictly like the case of *Potter v. Bank*, *supra*, in which a person situated as Crecilius is, with respect to the litigation, was held to be a competent witness. Whatever view, therefore, the court might entertain as to the competency

of the witness under the state law, it is compelled to hold that he is made a competent witness by the federal statutes. Judgment will accordingly go against the executrix for the amount of the comptroller's assessment; that is, for \$3,500, with interest at 6 per cent. per annum, to be computed from September 24, 1889, to this date.

SUTHERLAND v. ROSS.

(21 Atl. 351, 140 Pa. St. 379.)

Supreme Court of Pennsylvania. March 2,
1891.

Appeal from court of common pleas, Montgomery county; AARON S. SWARTZ, Judge.

Ejectment by James Sutherland against William Ross. From a judgment for defendant plaintiff appeals.

John M. Arundel, for appellant. *Louis M. Childs*, *Montgomery Evans*, and *Geo. N. Corson*, for appellee.

CLARK, J. The lot of ground in dispute is situated in West Conshohocken, in the county of Montgomery. It is one of two lots—Nos. 121 and 122—in a plot of lots laid out by one William Davis, Sr., conveyed by William Dager, Sr., to Nicholas F. Dager, by his deed dated April 6, 1871, and this is admitted to be the common source of title. The plaintiff gave in evidence a deed from Nicholas F. Dager and Elizabeth, his wife, dated 11th March, 1874, describing and conveying both of said lots to James Sutherland; consideration, \$1,350. The defendants thereupon gave in evidence the record of a deed dated 14th February, 1877, from James Sutherland and Agnes, his wife, reconveying the particular lot and premises in dispute to Nicholas F. Dager; consideration, \$1,000; and also a deed dated 3d April, 1887, from Nicholas F. Dager and wife to William Ross; consideration, \$1,400. The plaintiff, James Sutherland, then took the witness stand, and it was proposed to prove by him that the deed from Sutherland and wife to Dager, dated 14th February, 1877, was a forgery. Having been sworn on his *voir dire*, it appeared that Nicholas F. Dager, the grantee in the deed, was dead, and objection was made to the competency of Sutherland to testify to any matter occurring before the death of Dager. The objection was sustained, and the witness held to be incompetent. The plaintiff thereupon called Mrs. Mary Powell, one of the subscribing witnesses to the deed, who testified that Nicholas F. Dager was not present at the execution and acknowledgment of the instrument of writing, which she witnessed; that William Haywood, the other subscribing witness, and the justice of the peace before whom the deed purports to have been acknowledged, were present, but that the entire transaction occurred in the absence of Dager, the grantee therein. The offer was then renewed with some modification. The plaintiff's counsel offered to prove by Sutherland, the plaintiff, not that a forgery was committed by Dager, but that Dager employed William Haywood, the justice of the peace, as his agent on the 14th February, 1877, to prepare and obtain from James Sutherland and his wife a conveyance of the premises in dispute in consideration of the payment of \$1,000; and while in that employment the agent, Haywood, prepared or had prepared the deed dated 14th February, 1877, purporting to be signed by James Sutherland and

his wife, and witnessed by Mary Nugent and William Haywood, and purporting to be acknowledged before William Haywood as a justice of the peace, and that no such deed was signed by the witness or his wife, or by Mary Nugent as witness, or acknowledged before William Haywood as a justice of the peace. Objection was also made to this offer, to the same effect as before, which objection was sustained, and this is the first assignment of error. The contention of the appellant is that, as Dager, the grantee in the deed, was not present at the alleged execution of the deed, but was represented by an agent, who is alive and competent to testify as to the whole transaction, Sutherland, the surviving party, may testify, although Dager is dead. In clause E of the fifth section of the act of 23d May, 1887, it is provided in the plainest manner that where any party to a thing or contract in action is dead, and his rights thereto or therein have passed, either by his own act or by the act of the law, to a party on the record, who represents his interest in the subject in controversy, neither the surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of the deceased party, except in certain specified cases, shall be a competent witness to any matter occurring before his death. The thing or contract in action here is the right or title to the premises in dispute under the deed of 14th February, 1877, which is alleged to be a forgery, and the record of which was in evidence. Nicholas F. Dager was a party to that deed, and his right under it has by his own act passed to William Ross, a party on the record, who represents his interest in the subject in controversy; and it follows from the express words of the statute that James Sutherland, who is the surviving or remaining party to the deed, is not, in this case, competent to testify to any matter occurring before the death of Dager, who is deceased. It is true that at the time of the execution of the deed, or at the time of its alleged execution, Dager was not present. This is conceded; but he was a party to the deed, and in privity of estate with the plaintiff; and, although the transaction may have been conducted by Haywood, in his absence, in his interest, that, according to the terms of the statute, would not render Sutherland competent as a witness to testify on that subject after Dager's death. Such was the construction finally put upon similar language in the act of 1869. After the passage of that act the question arose whether the exclusion of parties to the action was only as to transactions with the decedent, and for a time, it must be conceded, the course of the decisions upon that point was somewhat unsteady; but it was the manifest purpose of the statute to close the mouth of him who is adversary to the deceased assignor. In *Karns v. Tanner*, 66 Pa. St. 297, the broad and general doctrine was thus stated by Mr. Justice AGNEW: "The true spirit of the proviso, then, seems to be that when a party to a thing or contract in action is dead, and his rights have passed, either by his own

act or by that of the law, to another, who represents his interest in the subject of controversy, the surviving party to that subject shall not testify to matters occurring in the life-time of the adverse party, whose lips are now closed." This statement of the law was followed in *Watts v. Leidig*, 29 Leg. Int. 293; *Brady v. Reed*, 87 Pa. St. 111; *Hess v. Gourley*, 89 Pa. St. 195; *Ewing v. Ewing*, 96 Pa. St. 381; *Foster v. Collner*, 107 Pa. St. 305; *Adams v. Edwards*, 115 Pa. St. 211, 8 Atl. Rep. 425. We think this was the settled construction, at the time of the passage of the act of 23d May, 1887, which has also

been similarly construed in *Duffield v. Hue*, 129 Pa. St. 94, 18 Atl. Rep. 566, and in *Parry v. Parry*, 130 Pa. St. 94, 18 Atl. Rep. 628. As *Sutherland* was himself incompetent, not only under the words and settled policy of the statute, but as a person "whose interest is adverse to the said right of the deceased," his wife was also incompetent for the same purpose. The identity of interest between husband and wife is such that, where one of them is incompetent to testify as a witness, the other is incompetent also. *Bitner v. Boone*, 128 Pa. St. 567, 18 Atl. Rep. 404.

Judgment is affirmed.

BASSETT v. UNITED STATES.

(11 Sup. Ct. 165, 137 U. S. 496.)

Supreme Court of the United States. Dec. 22, 1890.

In error to the supreme court of the territory of Utah.

F. S. Richards, for plaintiff in error.
Atty. Gen. Miller, for the United States.

Chief BREWER, J. On November 23, 1886, the grand jury of the first judicial district court of Utah found an indictment for polygamy against the plaintiff in error, charging him with having married one Kate Smith on the 14th day of August, 1884, when his lawful wife, Sarah Ann Williams, was still living and undivorced. Upon trial before a jury, a verdict of guilty was returned, and he was sentenced to imprisonment for a term of five years, and to pay a fine of \$500. Such sentence, on appeal, was affirmed by the supreme court of the territory, and is now brought to this court for review.

A preliminary question is presented by the attorney general. It is urged that there was no proper bill of exceptions as to the proceedings in the trial court, and therefore nothing is presented which this court can review. But we are reviewing the judgment of the supreme court of the territory; and the rule in this court is not to consider questions other than those of jurisdiction, which were not presented to the court whose judgment we are asked to examine. *Clark v. Fredericks*, 105 U. S. 4. Beyond the fact that the proceedings of the trial court were examined and considered by the supreme court of the territory, and are therefore presumably reviewable by this court, in this matter, noticed by this court in the case of *Hopt v. Utah*, 114 U. S. 488, 5 Sup. Ct. Rep. 972: That a large liberty of review is given by the statutes of Utah to the supreme court of the territory, even in the absence of a formal bill of exceptions. See, also, *Stringfellow v. Cain*, 99 U. S. 610; *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. Rep. 421. But it is unnecessary to rest upon this recognition by the supreme court of the territory, or the presumptions arising therefrom. The record shows the pleadings, proceedings, and exceptions to the charge of the trial judge, all certified properly by T. A. Perkins, the clerk of the trial court. At the close of his certificate, which is of date January 20, 1887, is this statement: "And I further certify that a copy of defendant's bill of exceptions in said cause is not made part hereof because said bill of exceptions is in the possession of defendant's counsel, at the city of Salt Lake, and because I am informed by said counsel that it has been stipulated by and between themselves and the United States district attorney for Utah territory that the original thereof in place of such copy should be used in the supreme court upon this appeal." The bill of exceptions referred to by him in this statement is signed by the trial judge, and thus indorsed: "No. 984. First Dist. Court, Utah. The United States vs. William E. Bassett. Polygamy. Bill of exceptions. Filed Jan'y 19th, 1887. T. A.

PERKINS, Clerk;" and also by the clerk of the supreme court of the territory as "Filed Feb'y 2nd, 1887," the date of the filing of the transcript of the proceedings of the trial court. The import of all this is that the bill of exceptions signed by the trial judge was filed in the trial court; and that, for the purposes of economy, time, and convenience, such original bill, together with the record of the proceedings, was brought to and filed in the supreme court after having been filed in the trial court. It needs but this suggestion, that if a copy is good the original is equally good. The identification of such bill of exceptions is perfect, vouched by the signatures of the trial judge, the clerk of the district court, and the clerk of the supreme court. To ignore such authentication would place this court in the attitude of resting on a mere technicality to avoid an inquiry into the substantial rights of a party, as considered and determined by both the trial court and the supreme court of the territory. In the absence of a statute or special rule of law compelling such a practice, we decline to adopt it.

Passing from this question of practice to the merits, the principal question, and the only one we deem necessary to consider, is this: The wife of the defendant was called as a witness for the prosecution, and permitted to testify as to confessions made by him to her in respect to the crime charged, and her testimony was the only direct evidence against him. This testimony was admitted under the first paragraph of section 1156 of the Code of Civil Procedure, enacted in 1884, (section 3878, Comp. Laws Utah 1888,) which reads: "A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." And the contention is that "polygamy" is within the language of that paragraph a crime committed by the husband against the wife. We think this ruling erroneous. A technical argument against it is this: The section is found in the Code of Civil Procedure, and its provisions should not be held to determine the competency of witnesses in criminal cases, especially when there is a Code of Criminal Procedure, which contains sections prescribing the conditions of competency. Section 421 of the Code of Criminal Procedure, (section 5197, Comp. Laws 1888,) is as follows: "Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other, in a criminal action or proceeding to which one or both are parties." Clearly under that section the wife was not a competent witness. It is true that the Code of Criminal Procedure was enacted in 1878, and the Code of Civil Procedure in 1884, so that the latter is the last expression of the leg-

islative will; but a not unreasonable construction is that the last clause of this paragraph was inserted simply to prevent the rule stated in the first clause from being held to apply to the cases stated in the last, leaving the rule controlling in criminal cases to be determined by the already enacted section in the Code of Criminal Procedure. This construction finds support in the fact that the same legislature which enacted the Code of Civil Procedure passed an act amending various sections in the Code of Criminal Procedure, among them the section following section 421, quoted above, and did not in terms amend such section, (Laws Utah 1884, c. 48, p. 119,) and in the further fact that the same legislature passed an act for criminal procedure in justices' courts, and in that prescribed the same rule of competency, and in the same language as is found in section 421. Laws Utah 1884, c. 54, subc. 10, § 100, p. 153. It can hardly be believed that the legislature would establish one rule of competency for a trial in a justice's court, and a different rule for a trial of the same offense on an appeal to the district court. And there are many offenses of which justices' courts have jurisdiction, which are like polygamy in their social immorality and their wrong to the wife.

But we do not rest our conclusion on this technical argument. If there were but a single section in force, and that the one found in the Code of Civil Procedure, we should hold the testimony of the wife incompetent. We agree with the supreme court of California, when, in speaking of their Codes, which in respect to these sections are identical with those of Utah, it says, in *People v. Langtree*, 64 Cal. 259, "We think upon a fair construction both mean the same thing, although the Penal Code is more explicit than the other. On this, as on nearly every other subject to which the Codes relate, they are simply declaratory of what the law would be if there were no Codes." See, also, *People v. Mullings*, 83 Cal. 138, 23 Pac. Rep. 229. It was a well-known rule of the common law that neither husband nor wife was a competent witness in a criminal action against the other, except in cases of personal violence, the one upon the other, in which the necessities of justice compelled a relaxation of the rule. We are aware that language similar to this has been presented to the supreme courts of several states for consideration. Some, as in Iowa and Nebraska, hold that a new rule is thereby established, and that the wife is a competent witness against her husband in a criminal prosecution for bigamy or adultery, on the ground that those are crimes specially against her. *State v. Sloan*, 55 Iowa, 217, 7 N. W. Rep. 516; *Lord v. State*, 17 Neb. 526, 23 N. W. Rep. 507. While others, as in Minnesota and Texas, hold that by these words no departure from the common-law rule is intended. *State v. Armstrong*, 4 Minn. 335, (Gil. 251;); *Compton v. State*, 13 Tex. App. 274; *Overton v. State*, 43 Tex. 616. This precise question has never been before this court, but the common-law rule has been noticed and commended in *Stein v. Bowman*, 13 Pet.

209, 222, in which Mr. Justice McLEAN used this language: "It is, however, admitted in all the cases that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse. * * * This rule is founded upon the deepest and soundest principles of our nature,—principles which have grown out of those domestic relations that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife would be to destroy the best solace of human existence." We do not doubt the power of the legislature to change this ancient and well-supported rule; but an intention to make such a change should not lightly be imputed. It cannot be assumed that it is indifferent to sacred things, or that it means to lower the holy relations of husband and wife to the material plane of simple contract. So, before any departure from the rule affirmed through the ages of the common law—a rule having its solid foundation in the best interests of society—can be adjudged, the language declaring the legislative will should be so clear as to prevent doubt as to its intent and limit. When a Code is adopted, the understanding is that such Code is a declaration of established law, rather than an enactment of new and different rules. This is the idea of a Code, except as to matters of procedure and jurisdiction which often ignore the past, and require affirmative description.

We conclude, therefore, that the section quoted from the Code of Civil Procedure, if applicable to a criminal case, should not be adjudged as working a departure from the old and established rule, unless its language imperatively demands such construction. Does it? The clause in the Civil Code is negative, and declares that the exception of the incompetency of wife or husband as a witness against the other does not apply to a criminal action or proceeding for a crime committed by one against the other. Is polygamy such a crime against the wife? That it is no wrong upon her person is conceded; and the common-law exception to the silence upon the lips of husband and wife was only broken, as we have noticed, in cases of assault of one upon the other. That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed, when he forgets his integrity as a man, and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he commits murder, or robbery, or forgery, than when he commits polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against

her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and, as the statute speaks of crimes against her, it is simply an affirmation of the old, familiar, and just common-law rule. We conclude, therefore, that un-

der this statute the wife was an incompetent witness as against her husband. Other questions in the record need not be considered, as they will probably not arise on a new trial. The judgment of the supreme court of the territory of Utah is reversed, and the case remanded, with instructions to order a new trial.

ROGERS v. STATE.¹

(29 S. W. 894, 60 Ark. 76.)

Supreme Court of Arkansas. Dec. 15, 1894.

Appeal from circuit court, Yell county; Jeremiah G. Wallace, Judge.

A. L. Rogers was convicted of manslaughter, and appeals. Reversed.

The appellant, Rogers, was indicted by the grand jury of Johnson county for the crime of murder. The indictment alleged that he killed and murdered one M. L. Kernoodle in said county by shooting him with a pistol. A change of venue was taken to Yell county, and the case was there tried. The evidence showed that Rogers and Kernoodle became engaged in a combat in the town of Clarks-ville, near the barber shop in which Kernoodle worked; that they had only struggled a moment before Rogers drew a pistol from his pocket, and shot Kernoodle. Kernoodle turned, and ran into his shop, screaming, "Murder!" As he entered, or was about to enter, the door of the shop, which was only a few steps away, Rogers fired again. Kernoodle staggered to the back part of the shop, sank down on the floor, and expired almost instantly. The ball from the first shot entered the front part of the body, near the left nipple; and that from the second entered the back, near the spine. Both balls passed entirely through the body, and both, in the opinion of the medical experts, were fatal wounds, though they did not feel quite so certain that the last wound would have destroyed life as they did that this result would have followed from the first wound alone. There was a conflict in the evidence as to whether Rogers or Kernoodle was the aggressor in the combat. From some of the evidence, one might conclude that the killing was premeditated on the part of Rogers; that he armed himself, and, going to the shop where Kernoodle worked, beckoned him to come out, and then, having willingly entered into a combat with him, deliberately killed him. There is other evidence which contradicted this, and tends to show that Kernoodle was the aggressor, and that, being a large and powerful man, he walked up to Rogers, and, after some words, without provocation struck Rogers a violent blow with his fist, pushed him against the wall, and was about to throw him down, when Rogers fired the first shot. There was some proof tending to show that at the time Kernoodle struck Rogers he was armed with a razor, although this was contradicted by other proof. The other facts will sufficiently appear from the opinion. The jury found the defendant guilty of the crime of voluntary manslaughter, and assessed his punishment at five years in the penitentiary.

J. E. Cravens, Martin & Murphy, and A. S. McKennon, for appellant. James P. Clarke, Atty. Gen., and Chas. T. Coleman, for the State.

RIDDICK, J. (after stating the facts). We need not consider the objections urged against the definitions of the words "willfully" and "deliberately" contained in instruction No. 1, given by the court. The object of those definitions, we suppose, was to inform the jury concerning the distinctions between the different degrees of homicide. As the defendant was only convicted of manslaughter, it is plain that, whether erroneous or not, they did him no harm. We find no error in either of the instructions numbered 2, 9, and 11, given by the court on its own motion, and to which defendant excepted. When taken in connection with the other instructions, we think they state the law as favorably to appellant as he had the right to demand.

The twelfth instruction given by the court, and to which the defendant objected, is as follows: (12) "If the jury believe that the defendant inflicted upon the body of the deceased two mortal wounds; that both wounds were necessarily fatal, and either of which, independent of the other, would have produced and resulted in the death of the deceased within a short time, of which two wounds the jury believe the deceased died; and the jury further find that the deceased had in good faith declined all further contest with defendant, and that, while deceased was fleeing from him, defendant inflicted the second fatal wound upon the body of the deceased by shooting him a second time; although the jury might believe the defendant fired the first shot in self-defense,—the killing would not be justifiable, but would amount to manslaughter only." It is said by Mr. Bishop that "whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible, if death follows, he will be deemed guilty of the homicide, though the person beaten would have died from other causes, or would not have died from this one had not others operated with it; provided the blow really contributed either mediately or immediately to the death in a degree sufficient for the law's notice." 2 Bish. Cr. Law (New) § 637. To same effect, see *Kee v. State*, 28 Ark. 160. If the defendant fired the first shot in necessary self-defense, and then afterwards, when Kernoodle had abandoned the contest, and was fleeing, he again fired upon him, inflicting another wound, when the circumstances were not such as to make a reasonable man in his situation believe that he was then in immediate danger of great bodily injury, he would be guilty either of some degree of homicide, or of an unlawful assault, depending upon the question whether or not the wound inflicted by the last shot either caused, contributed to, or accelerated his death. In other words, if the last shot was not fired in necessary self-defense, and the wound inflicted by it either caused his death, or contributed to or hastened it, the defendant would be guilty of some degree of homicide, even though the first shot was fired in self-defense, and

¹ Supplemental opinion omitted.

though at the time the last shot was fired the deceased was already so severely wounded that his death would have followed in a very short time. On the other hand, if the first shot was fired in self-defense, and the last shot neither caused his death nor contributed to nor hastened it, then he could not properly be convicted of any degree of homicide, but might be convicted of an assault. *Davis v. State*, 45 Ark. 464. The court, in giving instruction No. 12, doubtless had these rules of law in his mind, and the instruction, abstractly considered, is nearly correct, if not entirely so; but we doubt if in this case it presented the question in such a way as to let the jury understand that, in the event the first shot was fired in self-defense, then it became material for them to determine whether the last shot contributed to or hastened his death. Instruction No. 4, asked by the defendant, substantially covered the law on this point, but it was rather long, and also stated that, if the second shot did not contribute to the death of deceased, the jury must acquit, whereas they might still have found defendant guilty of an assault.

Another question raised by counsel is concerning the meaning of the phrase "great bodily injury." One of the counsel for defendant, in the course of his argument before the jury, stated that the law books did not define such phrase; whereupon the court interrupted him, and said that the law books did define it, and that its meaning was "a felony committed on the person." To this remark of the court defendant excepted at the time, and now contends that it was not a correct statement of the law, and that, even if correct, it should have been reduced to writing. It was held in *Reg. v. McNeill*, 1 *Craw. & D.* 80, that to constitute a grievous bodily harm, under a statute of Geo. IV., it was not necessary to show that the wound be on a vital part, or that the injury be of a permanent nature, or that life be endangered thereby; but that proof that the prisoner committed an assault with a deadly weapon, whereby a severe wound was inflicted, was sufficient to sustain an indictment for an assault to inflict grievous bodily harm. In the case of *Lawlor v. People*, 74 Ill. 230, the court said that the phrase "serious bodily injury" meant substantially the same as "great bodily injury," and that the meaning of both was "a high degree of injury, as opposed to a slight injury." The phrase "great bodily injury" is difficult to define, for the reason that it will define itself. It means a "great bodily injury," as distinguished from one that is slight or moderate, such as would ordinarily be inflicted by an assault and battery with the hand or fist without a weapon. To put one in danger of great bodily injury from an assault, something more than an attack with the hand or fist would usually be required, and it would rarely happen that one might lawfully take the life of another to avoid an assault with the fist

only. But cases might be supposed when it would be justifiable to do so; for an assault and battery by a powerful man with his fist upon a weak one might be carried to such extreme severity as to produce great bodily injury, and not be unaccompanied by such circumstances as to make it a felony. One who intentionally commits a great bodily injury upon the person of another may or may not be guilty of a felony, depending upon the circumstances; but, as such an injury may under some circumstances be committed and still the offender not be guilty of a felony, it is therefore not accurate to define "great bodily injury" as "a felony committed on the person." What constitutes a great bodily injury, and whether the circumstances in any case are such as to justify one in believing that such an injury is about to be committed upon him and in defending himself against it, are matters which must be left to a great extent to the judgment of the jury.

It is also contended that the court, before making this remark concerning the meaning of the phrase, "great bodily harm or injury," should have reduced it to writing; but we do not think this contention is well taken. It is the duty of the court to restrain the remarks of counsel within proper bounds. If, in the opinion of the court, counsel should announce propositions of law to the jury which are incorrect and misleading, the court should admonish counsel so that he may desist. It is not necessary to stop to reduce the admonition to writing before making it, but if it contains a statement of law the court should, at request of counsel, reduce the same to writing, and, if necessary, repeat it in its written form to the jury. No request was made to reduce this remark to writing. The general request to put all instructions in writing cannot be held to cover this remark, for it was not intended as a part of the instructions, but only as a correction of what was conceived to be a misstatement of the law in the part of counsel.

During the progress of the trial the presiding judge was called as a witness, and, over the objections of the defendant, testified on behalf of the state. His testimony was, in substance, that at a former term of the court, before the change of venue was taken, the defendant had filed a motion for continuance on account of the absence of one Bert Cunningham, whom he alleged was a material witness in his behalf. Afterwards Bert Cunningham appeared, and, defendant having made an application for bail, the judge, in open court, notified the attorneys of defendant that they might take the testimony of said Cunningham to be used on the application for bail; to which notification the attorneys of defendant made no response, and took no steps to procure the testimony of said Cunningham. It was not shown that the defendant was present at

the time this notification was given to his attorneys, or that he in any way approved of the conduct of his attorneys in this regard; on the contrary, defendant testified that he had been in prison, and did not know such notification was given. This evidence tended to make the impression that defendant had endeavored to procure a continuance on account of the absence of a witness whose testimony he did not want, when the failure to take this deposition may have been due to the neglect of his attorneys, and through no fault of the defendant. We think it clear that the testimony was incompetent. The trial judge seems to have arrived at the same conclusion, and afterwards, acting as a court, excluded the testimony which he had given as a witness. But the question still remains whether a judge, while presiding at a trial of a criminal case, may, against the objection of the defendant, testify as a witness on the part of the prosecution. The only reference to this question we find in our statute is section 2965, Sand. & H. Dig. That section is as follows: "The judge or juror may be called as a witness by either party; but, in such cases, it is in the discretion of the court to suspend the trial and order it to take place before another judge or jury; and when a party knows at the time the jury are impaneled, that a juror is to be called by him as a witness, he shall then declare it, and the juror shall be excluded from the jury." This section was taken from the Code of Practice in Civil Actions, and is the same as section 660 of that Code. There is a provision in the Code of Criminal Practice that the provisions of the Civil Code shall apply to and govern the summoning and coercing the attendance of witnesses, and compelling them to testify in all criminal prosecutions; but that provision, we think, refers to the chapter of the Civil Code regulating the issuance of subpoenas for witnesses and attachments for contempt. It does not refer to the competency of witnesses. While there are other portions of the Civil Code applicable to criminal proceedings, we do not find anywhere that this section is to apply to such proceedings; on the contrary, the language of the section itself furnishes convincing proof that it was only intended to apply to civil cases. It states that, when the judge or juror is called as a witness, it is in the discretion of the court to suspend the trial, and order it to take place before another judge or jury. It is plain that on a trial of a defendant for a felony, after the jury are impaneled and sworn, the court would have no power, without the consent of the defendant, to suspend the trial, and order it to take place before another jury. So we conclude that this section was not intended to apply to criminal proceedings, and that we have no statute permitting a judge to testify as a witness in a criminal trial over which he is presiding. It has been held in

England that a judge may give evidence, but that if he does so he must descend from the bench, and cannot return thither during the trial. *Sichel, Wit. 14.* This rule was applicable to trials where the court was composed of several judges. In such a court, a judge might descend from the bench, testify, and take no further part in the trial of the case without interfering with the progress of the trial. Speaking of this question, Mr. Rapalje says: "If the judge sits alone, he cannot be sworn at all; and, if he be one of several judges, he ought not to be, unless he leaves the bench during the trial. In such a case, the maxim that 'no one shall be both judge and witness in the same cause' prevails." *Rap. Wit. § 45.*

This question came before the supreme court of New York in a case where one of the two judges presiding had testified, and *Folger, J.*, who delivered the opinion of the court, said that it was erroneous, "because such practice, if sanctioned, may lead to unseemly and embarrassing results, to the hindering of justice, and to the scandal of the courts." In the same opinion, referring to the same matter, he says: "Other considerations may be added: If a judge is put upon the stand as a witness, he has all the rights of a witness, and he is subject to all the duties and liabilities of a witness. It may chance that he may for reasons sufficient to himself, but not sufficient for another of equal authority in the court, decline to answer a question put to him or in some other way bring himself in conflict with the court. Who shall decide what course shall be taken with him? Shall he return to the bench, and take part in disposing of the interlocutory question thus arising, and, upon the decision being made, go back to the stand or go into custody for contempt? The first would be unseemly, if not unlawful, for it would be passing judicially upon his own case. The last would disorganize the court and suspend its proceedings. Other like results may be conceived as possible, equally as contrary to the good conduct of judicial proceedings." *People v. Dohring, 59 N. Y. 374.* This reasoning applies with even greater force where the court is composed of only one judge, for, if the judge of such a court takes the stand to testify against the defendant, there is no one to control his testimony or keep him within proper bounds. Even if he can control his own testimony, and discharge, at the same time, what have been called "the incompatible duties of witness and judge," yet, however careful and conscientious he may be, the chances are great that by thus testifying he will to some extent detract from the dignity that should surround the functions of his high office. Instead of the impartial judge administering the law with a firm and even hand, he takes on for the time the appearance of a partisan, endeavoring to

uphold by his testimony one side against the other. More than likely he provokes unseemly conflicts between himself and counsel, and arouses the distrust of the party against whom he testifies. In addition to this, the higher his character and standing as a judge the more danger that he thus gives the party in whose favor he testifies an undue advantage over the opposing side. For these reasons, in the interest of the dignity and decorum of the circuit court and the orderly procedure therein, we feel compelled to hold that a judge presiding at a criminal trial cannot, against the objection of the defendant, be sworn and testify as a witness on the part of the prosecution. Bish.

Cr. Proc. § 1145; Underh. Ev. § 313. We do not mean to intimate that in this case there was any partiality shown by the learned judge of the circuit court. The record shows to the contrary. The section of the Digest above referred to is calculated to mislead, if not read carefully, and the mistake arose from being compelled to construe it in the hurry of a nisi prius trial. There were objections made to other rulings of the court, but, when taken in connection with the facts of this case, we do not discover any error except as above indicated. For those errors the judgment is reversed, and the cause remanded for a new trial.

* * * * *

Smith
MATTOX v. UNITED STATES.

(13 Sup. Ct. 50, 146 U. S. 140.)

Supreme Court of the United States. Nov. 14, 1892.

In error to the district court of the United States for the district of Kansas. Reversed.

This was an indictment charging Clyde Mattox with the murder of one John Mullen, about December 12, 1889, in that part of the Indian Territory made part of the United States judicial district of Kansas by section 2 of the act of congress of January 6, 1883, (22 St. p. 400, c. 13,) entitled "An act to provide for holding a term of the district court of the United States at Wichita, Kansas, and for other purposes."

Defendant pleaded not guilty, was put upon his trial, October 5, 1891, and on the 8th of that month was found guilty as charged, the jury having retired on the 7th to consider of their verdict. Motions for a new trial and in arrest of judgment were severally made and overruled, and Mattox sentenced to death. This writ of error was thereupon sued out.

The evidence tended to show that Mullen was shot in the evening between 8 and 9 o'clock, and that he died about 1 or 2 o'clock in the afternoon of the next day; that three shots were fired and three wounds inflicted; that neither of the wounds was necessarily fatal, but that the deceased died of pneumonia produced by one of them described as "in the upper lobe of the right lung, entering about two or three inches above the right nipple, passing through the upper lobe of the right lung, fracturing one end of the fourth rib, passing through and lodging beneath the skin on the right side beneath the shoulder blade." The attending physician, who was called a little after 9 o'clock and remained with the wounded man until about 9 o'clock in the morning, and visited him again between 8 and 9 o'clock, testified that Mrs. Hatch, the mother of Clyde Mattox, was present at that visit; that he regarded Mullen's recovery as hopeless; that Mullen, being "perfectly conscious" and "in a normal condition as regards his mind," asked his opinion, and the doctor said to him: "The chances are all against you; I do not think there is any show for you at all." The physician further testified, without objection, that, after he had informed Mullen as to his physical condition, he asked him as to who shot him, and he replied "he didn't have any knowledge of who shot him. I interrogated him about three times in regard to that,—who did the shooting,—and he didn't know." Counsel for defendant, after a colloquy with the court, propounded the following question: "Did or did not John Mullen, in your presence and at that time, say, in reply to a question of Mrs. Hatch, 'I know your son, Clyde Mattox, and he did not shoot me; I saw the parties who shot me, and Clyde was not one of them?'" This question was objected to

as incompetent, the objection sustained, and defendant excepted. Counsel also propounded to Mrs. Hatch this question: "Did or did not John Mullen say to you, on the morning you visited him, and after Dr. Graham had told him that all the chances for life were against him, 'I know Clyde Mattox, your son, and he was not one of the parties who shot me?'" This was objected to on the ground of incompetency, the objection sustained, and defendant excepted.

In support of his motion for new trial, the defendant offered the affidavits of two of the jurors that the bailiff who had charge of the jury in the case after the cause had been heard and submitted, "and while they were deliberating of their verdict," "in the presence and hearing of the jurors or a part of them, speaking of the case, said: 'After you fellows get through with this case it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him.' And at another time, in the presence and hearing of said jury or a part of them, referring to the defendant, Clyde Mattox, said: 'This is the third fellow he has killed.' " The affidavit of another juror to the same effect, in respect of the remark of the bailiff as to Thompson, was also offered, and, in addition, the affidavits of eight of the jurors, including the three just mentioned, "that after said cause had been submitted to the jury, and while the jury were deliberating of their verdict, and before they had agreed upon a verdict in the case, a certain newspaper printed and published in the city of Wichita, Kan., known as 'The Wichita Daily Eagle,' of the date of Thursday morning, October 8, 1891, was introduced into the jury room; that said paper contained a comment upon the case under consideration by said jury, and that said comment upon said case so under consideration by said jury was read to the jury in their presence and hearing; that the comment so read to said jury is found upon the fifth page of said paper, and in the third column of said page, and is as follows:

"The Mattox Case—The Jury Retired at Noon Yesterday and is Still Out. The destiny of Clyde Mattox is now in the hands of the twelve citizens of Kansas composing the jury in this case. If he is not found guilty of murder he will be a lucky man, for the evidence against him was very strong, or, at least, appeared to be to an outsider. The case was given to the jury at noon yesterday, and it was expected that their deliberations would not last an hour before they would return a verdict. The hour passed, and nine more of them with it, and still a verdict was not reached by 10:30 last night, when the jury adjourned and went to their rooms at the Carey. Col. Johnson, of Oklahoma city, defended him, and made an excellent speech in his behalf to the jury. Mr. Ady also made a fine speech, and one that was full of argument and replete with the details of the crime committed, as gathered from the statements of witnesses. The

lawyers who were present and the court officers also agree that it was one of the best and most logical speeches Mr. Ady ever made in this court. It was so strong that the friends of Mattox gave up all hope of any result but conviction. Judge Riner's instructions to the jury were very clear and impartial, and required nearly half an hour for him to read them. When the jury filed out, Mattox seemed to be the most unconcerned man in the room. His mother was very pale, and her face indicated that she had but very little hope. She is certainly deserving of a good deal of credit, for she has stuck by her son, as only a mother can, through all his trials and difficulties, and this is not the first one by any means, for Clyde has been tried for his life once before. He is a youthful looking man of light build, a beardless face, and a nervous disposition. The crime for which he has just been tried is the killing of a colored man in Oklahoma city over two years ago. Nobody saw him do the killing, and the evidence against him is purely circumstantial, but very strong, it is claimed by those who heard all the testimony."

The bill of exceptions states that these affidavits and a copy of the newspaper referred to "were offered in open court by the defendant in support of his motion for a new trial, and by the said district court excluded; to which ruling the defendant, by his counsel, then and there excepts and still excepts." And the defendant excepted to the overruling of his motions for new trial and in arrest of judgment.

J. W. Johnson, for plaintiff in error. Asst. Atty. Gen. Maury, for the United States.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error, (*Henderson v. Moore*, 5 Cranch, 11; *Newcomb v. Wood*, 97 U. S. 581;) but in the case at bar the district court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein. Due exception was taken, and the question of admissibility thereby preserved.

It will be perceived that the jurors did not state what influence, if any, the communication of the bailiff and the reading of the newspaper had upon them, but confined their statements to what was said by the one and read from the other.

In *U. S. v. Reid*, 12 How. 361, 366, affidavits of two jurors were offered in evidence to establish the reading of a newspaper report of the evidence which had been given in the case under trial, but both deposed that it had no influence on their verdict. Mr. Chief Justice Taney, delivering the opinion of the court, said: "The first branch of

the second point presents the question whether the affidavits of jurors impeaching their verdict ought to be received. It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution, but cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. It is, however, unnecessary to lay down any rule in this case, or examine the decisions referred to in the argument; because we are of opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decision, and both of them swear that these papers had not the slightest influence on their verdict." The opinion thus indicates that public policy, which forbids the reception of the affidavits, depositions, or sworn statements of jurors to impeach their verdicts, may, in the interest of justice, create an exception to its own rule, while at the same time the necessity of great caution in the use of such evidence is enforced.

There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.

This distinction is thus put by Mr. Justice Brewer, speaking for the supreme court of Kansas in *Perry v. Bailey*, 12 Kan. 539, 545: "Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because, being personal, it is not accessible to other testimony. It gives to the secret thought of one the power to disturb the expressed conclusions of twelve. Its tendency is to produce bad faith on the part of a minority; to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors. If one affirms misconduct, the remaining eleven can deny. One cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law, the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict,—an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one."

The subject was much considered by Mr. Justice Gray, then a member of the supreme judicial court of Massachusetts, in *Woodward v. Leavitt*, 107 Mass. 453, where numerous authorities were referred to and applied, and the conclusions announced "that, on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors, as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to sup-

port the verdict. But a jurymen may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a jurymen may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial." See, also, *Ritchie v. Hoibrooke*, 7 Serg. & R. 458; *Chews v. Driver*, 1 N. J. Law, 166; *Nelms v. State*, 13 Smedes & M. 500; *Hawkins v. New Orleans, etc., Co.*, 29 La. Ann. 134, 140; *Whitney v. Whitman*, 5 Mass. 405; *Hix v. Drury*, 5 Pick. 296.

We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority. These affidavits were within the rule, and, being material, their exclusion constitutes reversible error. A brief examination will demonstrate their materiality.

It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence, the separation of the jury in such a way as to expose them to tampering may be reason for a new trial, variously held as absolute; or *prima facie*, and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took place. *Whart. Crim. Pl.* §§ 821, 823, 824, and cases cited.

Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Indeed, it was held in *People v. Knapp*, 42 Mich. 267, 3 N. W. Rep. 927, that the presence of an officer during the deliberations of the jury is such an irregular invasion of the right of trial by jury as to absolutely vitiate the verdict in all cases, without regard to whether any improper influences were actually exerted over the jury or not. And in *State v. Snyder*, 20 Kan. 306, where the bailiff who had charge of the jury had been introduced and examined as a witness on behalf of the state, and had testified to material facts against the accused, his presence in the jury room during the deliberations of the jury was held fatal to the verdict.

In *Gainey v. People*, 97 Ill. 270, the supreme court of Illinois was of opinion that the presence of a bailiff, in charge of a jury in a capital case, in the jury room during a part of their deliberations, was a grave irregularity and a breach of duty on the part of the officer, which would or would not vitiate the verdict, depending upon the circumstances in each particular case; and the application of the rule in *State v. Snyder* was approved, but the conclusion reached in *Peo-*

ple v. Knapp was not fully sanctioned. The text-books refer to many cases in which the action of the officer having a jury in charge, when prejudice might have resulted; or unauthorized communications having a tendency to adverse influence; or the reading of newspapers containing imperfect reports of the trial, or objectionable matter in the form of editorial comments or otherwise, — have been held fatal to verdicts.

The jury in the case before us retired to consider of their verdict on the 7th of October, and had not agreed on the morning of the 8th, when the newspaper article was read to them. It is not open to reasonable doubt that the tendency of that article was injurious to the defendant. Statements that the defendant had been tried for his life once before; that the evidence against him was claimed to be very strong by those who had heard all the testimony; that the argument for the prosecution was such that the defendant's friends gave up all hope of any result but conviction; and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict, — could have no other tendency. Nor can it be legitimately contended that the misconduct of the bailiff could have been otherwise than prejudicial. Information that this was the third person Clyde Mattox had killed, coming from the officer in charge, precludes any other conclusion. We should therefore be compelled to reverse the judgment because the affidavits were not received and considered by the court, but another ground exists upon which we must not only do this, but direct a new trial to be granted.

Dying declarations are admissible on a trial for murder, as to the fact of the homicide and the person by whom it was committed, in favor of the defendant as well as against him. 1 East, p. C. 353; *Rex v. Scaife*, 1 Moody & R. 551; *U. S. v. Taylor*, 4 Cranch, C. C. 338; *Moore v. State*, 12 Ala. 764; *Com. v. Matthews*, 89 Ky. 287, 12 S. W. Rep. 333. But it must be shown by the party offering them in evidence that they were made under a sense of impending death. This may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted being obviously such that he must have felt or known that he could not survive; as well as from his conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him. The length of time elapsing between the making of the declaration and the death is one of the elements to be considered, although, as stated by Mr. Greenleaf, "it is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible." 1 Greenl. Ev. (15th Ed.) §§ 156, 157, 158; *State v. Wensell*, 98 Mo. 137, 11 S. W. Rep. 614; *Com. v. Haney*, 127 Mass. 455; *Kelhoe v. Com.*, 85 Pa. St. 127; *Swisher v.*

Com., 26 Grat. 963; State v. Schmidt, 73 Iowa, 469, 35 N. W. Rep. 590. In Reg. v. Perkins, 9 Car. & P. 395, the deceased received a severe wound from a gun loaded with shot, of which wound he died at 5 o'clock the next morning. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover, made no reply, but appeared dejected. It was held by all the judges of England that a declaration made by him at that time was receivable in evidence on the trial of a person for killing him, as being a declaration in articulo mortis. There the declaration was against the accused, and obviously no more rigorous rule should be applied when it is in his favor. The point is to ascertain the state of the mind at the time the declarations were made. The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood and enforce as strict adherence to the truth as the obligation of an oath could impose. But the evidence must be received with the utmost caution, and, if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed is realized by the dying man because of the hope of recovery, it ought to be rejected. In this case the lapse of time was but a few hours. The wounds were three in number, and one of them of great severity. The

patient was perfectly conscious, and asked the attending physician his opinion, and was told that the chances were all against him, and that the physician thought there was no "show for you [him] at all." He was then interrogated as to who did the shooting, and he replied that he did not know. All this was admitted without objection. Defendant's counsel then endeavored to elicit from the witness whether, in addition to saying that he did not know the parties who shot him, Mullen stated that he knew Clyde Mattox, and that it was not Clyde who did so. The question propounded was objected to on the sole ground of incompetency, and the objection sustained. In this, as the case stood, there was error. So long as the evidence was in the case as to what Mullen said, defendant was entitled to refresh the memory of the witness in a proper manner, and bring out, if he could, what more, if anything, he said in that connection. It was not inconsistent with Mullen's statement that he did not know the parties, for him also to have said that he knew Mattox was not one of them. His ignorance of who shot him was not incompatible with knowledge of who did not shoot him. We regard the error thus committed as justifying the awarding of a new trial.

The judgment is reversed, and the cause remanded to the district court of the United States for the district of Kansas, with a direction to grant a new trial.

VOGEL v. GRUAZ.

(4 Sup. Ct. 12, 110 U. S. 311.)

Supreme Court of the United States. Feb. 4, 1884.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

J. K. Edsall and John B. Hawley, for plaintiff in error. H. S. Greene and John M. Palmer, for defendant in error.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an action on the case, brought by Timothy Gruaz, against Rudolph Bircher, to recover damages for the speaking and publishing of false, malicious, scandalous, and defamatory words, charging the plaintiff with being a thief, and with having stolen the money of the defendant, meaning the crime of larceny. The suit was commenced in a state court of Illinois, and was removed by the defendant into the circuit court of the United States for the Southern district of Illinois. At the trial before a jury a verdict was rendered for the plaintiff, June 6, 1879, for \$6,000 damages. On the next day the defendant filed a motion for a new trial. On the fourteenth of June the defendant died, on the twelfth of July an order abating the case was moved for, on behalf of the defendant, and on the sixteenth of August the court overruled the motion for a new trial and the motion for an order of abatement, and entered a judgment for the plaintiff, against Bircher, for \$6,000 and costs, as of June 7, 1879. The order for judgment recited that the hearing by the court of the motion for a new trial was, when it was filed, postponed to a then future and convenient day of the same term, and that the defendant died pending the hearing of the motion. Leave was given to the executor of the defendant to prepare a bill of exceptions and to take a writ of error. The bill of exceptions being signed, it was filed by the executor, and the writ of error was issued. Various errors are assigned, and among them that the circuit court did not grant the motion to abate the suit, and that it rendered a judgment against Bircher after his death. But it is unnecessary to pass on those questions, because we are of opinion that the judgment must be reversed for another error committed at the trial.

Three witnesses for the plaintiff gave evidence tending to prove the speaking to them by the defendant of more or less of the words set forth in the declaration; and afterwards C. L. Cook was sworn as a witness for the plaintiff, and testified that he was state's attorney for Madison county, Illinois: he had a slight acquaintance with Bircher; and that he knew Gruaz. The following proceedings then occurred: "Question. I will ask you if you had any conversation with Dr. Bircher with regard to Gruaz, and, if

so, when was it? Counsel for defense asked witness if at that time he was occupying the same position he now holds. Answer. Yes, sir. Q. It was communicated to you while you held that position and were acting in that capacity, whatever was communicated to you by Bircher? A. Yes, sir. (Defendant's counsel object to witness testifying to matters disclosed to him by the defendant under the circumstances stated, on the ground that such communications are to be treated as privileged.) The Court. I will ask the witness if he regarded it professionally as a privileged communication? A. I had never met defendant before; he was introduced to me by a citizen of our place, and he informed me that he wanted to talk with me with regard to a matter he wanted to bring before the grand jury. (Objected to.) The Court. I will allow the witness to state what the doctor said on that occasion. Of course, if he made the communication to the witness in good faith, there would be no malice about it, and I shall instruct the jury to disregard it. The objection is overruled. To which ruling of the court the defendant at the time excepted. A. As I stated, I had at that time no acquaintance with defendant whatever. He inquired for the state's attorney, and was introduced to me, and he spoke of his affairs. He said he wanted to bring a matter before the grand jury in regard to Mr. Gruaz. I talked with him in regard to the nature of the matter, and he talked pretty freely in regard to it, and I directed him to the grand jury room. He said a good many things. He was evidently in earnest at the time, expressed himself very freely in regard to him. I would not like to swear to the exact words used, or that anybody used at the time. I can give the substance of what he said, I suppose. He wanted to prosecute Gruaz for stealing, was the amount of it. I recollect this: he charged him with having stolen his money, and I asked him how, and he told me how it had been done. Gruaz was his agent and handled his funds, rented his farms, and had failed to account for a large amount of money, he told me, and he charged him in this conversation with having stolen his money, and he said he wanted to know if there was any law in this state to prosecute a man for that. I have no objection to state any words. I remember his making the charge that he had stolen his money, but I can't swear that the word 'thief' was used at that time; that it was in substance, undoubtedly. My impression is that this was the March term, 1878, of the circuit court of Madison county, either that or October term. 1877; my recollection and decided impression is that it was the spring term, 1878. Dr. Bircher went into the grand jury room and gave his statement to the grand jury. He was anxious, of course, to have the indictment found, and he evidently believed or so expressed him-

self. (Counsel for defendant objected to witness stating his opinion about what defendant evidently believed.) The Court. He said he went before the grand jury, and said he seemed to be in earnest in his movements, but he didn't say what took place before the grand jury. Don't know, I suppose. Witness. No, I don't know. Cross-examination. Maj. Prickett introduced Bircher to me; never saw him before in my life. I was certain he came to see me as prosecuting attorney, in good faith. That was his business, as he stated it to me. After he made his statement to me I advised him to go before the grand jury; directed him to their room. He went there by my advice. Hold on—I don't say that; I advised him that he had a good case. He came to me and I showed him where the grand jury room was. He stated his case to me as state's attorney. I then directed him where to go, and said I should prosecute it as vigorously as possible, if the indictment was found. In regard to the advice I gave him, I rather encouraged him to drop the thing; I told him he had better sue Mr. Gruaz first, and see if he couldn't get judgment against him, and so put it in a better shape to prosecute him. He stated his case, and I thought from his statement that he would have few, if any, witnesses besides himself, and that it would be doubtful, however honestly he might believe, that he had cause; it would be doubtful whether the jury would bring a bill; so I advised him to bring a civil suit; but, said I, you are here, and you mustn't think hardly of me if the grand jury don't find a bill; and I directed him to the grand jury room."

The bill of exceptions also contains the following: "In reference to the testimony of state's attorney C. L. Cook, the court instructed the jury as follows: 'I admitted that evidence with an explanation, and with the explanation made in the admission of it I think I am content, and I think the jury may take it into consideration; but if they think the defendant was actuated by honest motives in making the declaration he did, they will disregard it.' To the giving of which last instruction the defendant excepted, for the reason that the instruction ignores the element of want of probable cause, and for the reason also that the jury should have been instructed to disregard Cook's testimony entirely."

We are of opinion that what was said by Bircher to Mr. Cook was an absolutely privileged communication. It was said to Mr. Cook while he was state's attorney or prosecutor of crimes for the county, and while he was acting in that capacity. Bircher inquired for the state's attorney and was introduced to him, and stated to him that he wanted to talk with him about a matter he wanted to bring before the grand jury in regard to Gruaz. He laid the matter before Mr. Cook, and charged Gruaz with having

stolen his money, and was asked how, and stated how and inquired of Mr. Cook if there was any law in Illinois by which a man could be prosecuted for that. The grand jury was then in session, and Mr. Cook advised Bircher that he had a good case and directed him to the grand jury room, and Bircher went before the grand jury. If all this had taken place between Bircher and an attorney consulted by him who did not hold the public position which Mr. Cook did, clearly, the communication would have been privileged and not to be disclosed against the objection of Bircher. Under the circumstances shown, Mr. Cook was the professional adviser of Bircher, consulted by him on a statement of his case, to learn his opinion as to whether there was ground in fact and in law for making an attempt to procure an indictment against Gruaz. The fact that Mr. Cook held the position of public prosecutor, and was not to be paid by Bircher for information or advice, did not destroy the relation which the law established between them. It made that relation more sacred on the ground of public policy. The avenue to the grand jury should always be free and unobstructed. Bircher might have gone directly before it without consulting Mr. Cook, but if he chose to consult him instead of a private counsel, there was great propriety in his doing so. Any person who desires to pursue the same course should not be deterred by the fear of having what he may say in the confidence of a consultation with a professional adviser, supposed to be the best qualified for the purpose, disclosed afterwards in a civil suit against his objection. *Oliver v. Pate*, 43 Ind. 132. By the statute of Illinois in force at the time of this occurrence, it was made the duty of each state's attorney to "commence and prosecute" all criminal actions, suits, indictments, and prosecutions in any court of record in his county, in which the people of the state or county might be concerned. (Rev. St. 1874, c. 14, § 5, subd. 1.) Under this provision it was the province and the privilege of any person who knew of facts tending to show the commission of a crime, to lay those facts before the public officer whose duty it was to commence a prosecution for the crime. Public policy will protect all such communications absolutely, and without reference to the motive or intent of the informer or the question of probable cause; the ground being that greater mischief will probably result from requiring or permitting them to be disclosed than from wholly rejecting them. Mr. Cook learned from Bircher the things to which he testified, because he occupied the position of public prosecuting officer, and because he was acting at the time as the legal adviser of Bircher in respect to the matter and question which Bircher was laying before him. The free and unembarrassed administration of justice in respect to the criminal law in which the

public is concerned, is involved in a case like the present, in addition to the considerations which ordinarily apply in communications from client to counsel in matters of purely private concern. Bircher made his communication to Mr. Cook for the purpose of obtaining professional advice as to his right, and that of the public through him, to have a criminal prosecution commenced by Mr. Cook by the intervention of the grand jury against Gruaz.

But there is another view of the subject. The matter concerned the administration of penal justice, and the principle of public safety justifies and demands the rule of exclusion. In *Worthington v. Scribner*, 109 Mass. 487, an action for maliciously and falsely representing to the treasury department of the United States that the plaintiff was intending to defraud the revenue, it was held that the defendant could not be compelled to answer whether he did not give to the department information of supposed or alleged frauds on the revenue contemplated by the plaintiff. The principle laid down in that case was, that it is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws; and that a court of justice will not compel or allow such information to be disclosed, either

by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications. The authorities are collected and reviewed in that case. The case of *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, there cited, was affirmed by the house of lords, L. R. 7 H. L. 744. See, also, 1 Greenl. Ev. § 250; *Black v. Holmes*, 1 Fox & Sm. 28.

It makes no difference that there was evidence of the speaking of the same words to persons other than Mr. Cook, and that the speaking of them to Mr. Cook was not the sole ground of action or of recovery. The evidence was incompetent, and it must be inferred that it affected the minds of the jury both on the main issue and on the question of damages.

It results from these views that the judgment below cannot be upheld, and that it must be reversed, and the case be remanded to the circuit court, with direction to set aside the verdict and vacate the judgment and take such further proceedings as may be according to law and not inconsistent with this opinion.

Appeal of HARTRANFT et al.

(85 Pa. St. 433.)

Supreme Court of Pennsylvania. Jan. 7, 1878.

This is an appeal of John F. Hartranft, governor of the commonwealth, M. S. Quay, secretary of the commonwealth, James W. Latta, adjutant general of the commonwealth, General R. M. Brinton, and Major A. Wilson Norris, from an order of the court of quarter sessions of the peace of Allegheny county, directing attachments to issue against them for failure to obey a subpoena of the grand jury who were investigating the matters of the riots at Pittsburgh of July 21 and 22, 1877.

Thomas M. Marshall, Lynian D. Gilbert, Dep. Atty. Gen., and George Lear, Atty. Gen., for appellants. E. A. Montooth, Dist. Atty., Morton Hunter, Asst. Dist. Atty., S. A. McClung, and George Shiras, Jr., contra.

GORDON, J. Grand juries have the power to make presentment, not only of such criminal offences as may be laid before them by the district attorney in the form of bills of indictment, and of such as may come within the personal knowledge of individual members thereof, but also of all such matters as may be given them in charge by the court. Neither is there any doubt about the power of the court to direct that body to make inquiry concerning affairs which directly affect the public peace and society, among which affairs may be instanced great riots, such as those which recently disturbed the well-disposed citizens of Pittsburgh and its vicinity. Matters of this kind may properly be referred to the consideration of the grand inquest in order that the instigators thereof and the participants therein may be brought to justice; and this is the more necessary because in times of public tumult and alarm private prosecutors may be overawed through fear of personal violence.

Doubtless the proceedings in the case before us are very irregular, since there seems to be a total inversion of the proper order of things. It was the duty of the court, not of the grand jury, first to move in the matter. In a subject of so much importance, and one requiring the exercise of so much care and discretion, the court should have instructed this jury as to what it was to investigate, and in what manner the investigation was to be conducted. Nothing of the kind, however, was done; but the court, having approved its petition, suffered it to proceed to the adoption of its own subjects, after its own methods, and, by this sufferance, it allowed an important public investigation to pass from its own control to that of a body of men, which, as it was governed by no regular instructions, resembled more a committee for the general investigation of public affairs, than a lawful constituent of the court of quarter sessions. This, however, is really of small importance to the matter in hand;

neither can the appellants call in question the regularity of the proceedings as between the court and its grand jury; for if they have been properly subpoenaed, and can present no lawful excuse for their want of obedience to the mandate of the quarter sessions, they must stand convicted of a contempt, and we cannot help them. The subpoena is the process of the commonwealth, and there is no doubt about the court's power to issue that process in proper cases.

Our inquiry, then, is limited to two propositions: Were the subpoenas regular, such as an ordinary citizen would be bound to obey? If so, were the appellants liable to attachment for disobedience to this process? The subpoena we have before us, like the other proceedings in this case, is very irregular. It is, indeed, but a general mandate of the court, ordering the appellants to appear, "to testify, all and singular, those things which they may know touching a certain investigation being had, on formal presentment, by and before the grand jury, relating to the late riots of July last, in said county, in said court depending." It sets forth no case, present or prospective, nor does it state for whom, or at whose instance, the defendants were to be subpoenaed. As this writ is a very arbitrary one, obliging the citizen to leave his home and abandon his business, however important it may be, and give his attendance at court, wherever that may be sitting, it is very important to know what parties are entitled to it; for if it be issued at the suit of one having no right thereto, it is no contempt to disobey it. The commonwealth may have this process in any proceeding where its interest is apparent, whether as a suitor or a prosecutor, and so may parties in courts, either civil or criminal; but we have yet to learn that any such right exists in a court, in its mere character as a court, separated from the case which it has in hand. So this, as well as every other compulsory process, must show upon its face that it was issued for some person or party having a right thereto, otherwise it is nugatory and void, and disobedience to its mandate involves no penalty whatever. In the case before us there was the use of the writ of subpoena, as a mere order of the court, without statement of party or case, commanding the defendants to appear before the grand jury, for the purpose of giving their testimony touching the late riots. If there is any law authorizing such process, we have not been informed of it.

No doubt the court might have directed a subpoena to have issued for the commonwealth, in any case where the commonwealth was a party, or where it was apparent it was in some way interested in some case or transaction then depending. So might it have directed a warrant to have issued for the arrest of some one guilty of a crime or misdemeanor; but in such case no one would

contend that the mere blank warrant of the court would in itself be sufficient to detain a citizen for one moment. The authority for such warrant must appear upon its face or it is worthless. But the court's subpoena is no more respectable than its warrant. If the subpoena exhibit no authority it may be disobeyed with impunity. Now, in the case before us, the commonwealth was not a party in interest, or, if so, it is not now apparent. It seems, from the petition of the grand jury, that the citizens of the county of Allegheny "were greatly concerned in having a careful investigation of the late riots," but whether they were concerned in bringing the rioters to justice or not is not stated, though this was the only matter in which the commonwealth could be concerned. Moreover, as the grand jury was acting under no instruction, it was not possible, even for the court, to know what that jury was doing or intended to do, but of this the court should have been informed before it undertook to interfere with the personal liberty of the citizen by its summary process of attachment, for, as the matter now stands, it is apparent that the subpoena was issued for no tangible cause or party and for no properly defined legal purpose; hence no one was bound to obey it.

For the purposes of this case, however, we may admit the regularity of this subpoena, and that, upon an ordinary citizen, it would have been binding and obligatory, for we regard the question of the liability of the appellants to attachment, in any event, as the prime one in this case. In order to resolve this, we must first understand who the persons are against whom the court has directed its attachment, and for what purpose they have been subpoenaed. They are the governor of Pennsylvania, the secretary of the commonwealth, the adjutant general, chief officers of the executive department of the state government, and two officers of the national guard; the latter subordinates acting under the orders of the former. The purpose, for which these officers are subpoenaed is that the grand jury may be put into possession of any information they may be possessed of, or that may be within the power of their several departments, concerning the military or other means used by them in the suppression of the late riots in the city of Pittsburgh. It will be observed that these persons are subpoenaed for the purpose of compelling a revelation of such things as have come to their knowledge in their official capacities, and which strictly belong to their several departments as officers of the commonwealth. This is clearly set out in the answer by the attorney general to the application for the attachment, and there has been no denial thereof upon the argument before us. In order to simplify matters, we may treat this case just as though the process, first and last, were against the gov-

ernor alone; for if he is exempt from attachment because of his privilege, his immunity protects his subordinates and agents. The general principle is that whenever the law vests any person with the power to do an act at the same time constituting him a judge of the evidence on which the act may be done, and contemplating the employment of agents through whom the act is to be accomplished, such person is clothed with discretionary powers, and is *quoad hoc* a judge. His mandates to his legal agents, on his declaring the event to have happened, will be a protection to those agents. *Vanderheyden v. Young*, 11 Johns. 158, per Spencer, J.

It follows, if the governor, as supreme executive, and as commander in chief of the army of the commonwealth, is charged with the duty of suppressing domestic insurrections, he must be the judge of the necessity requiring the exercise of the powers with which he is clothed; and his subordinates, who are employed to render these powers efficient and to produce the legitimate results of their exercise, can be accountable to none but him. In like manner, if he is constituted the judge of what things, knowledge, or information, coming into his department through himself personally or from his subordinates may or may not be revealed, then such subordinates, without his permission, cannot be compelled to disclose, in court, any such matters or information.

What, then, are the duties, powers, and privileges of the governor? In the language of the constitution (article 4, § 2): "The supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed." Also, same article, section 7: "The governor shall be commander in chief of the army and navy of the commonwealth, and of the militia, except when they shall be called into the actual service of the United States." He is also invested with the appointment and pardoning powers, the power to convene the legislature in cases of emergency, and to approve or veto bills submitted to him by the general assembly. It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, the supreme executive power is vested in the governor, and he is charged with the faithful execution of the laws, and for the accomplishment of this purpose he is made commander in chief of the army, navy, and militia of the state. Who, then, shall assume the power of the people, and call this magistrate to an account for that which he has done in discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the court of quarter sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his con-

stitutional functions as executor of the laws and commander in chief of the militia of the commonwealth? For it certainly is a logical sequence that if the governor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the court of quarter sessions of Allegheny county can shut him up in prison for refusing to appear before it and reveal the methods and means used by him to execute the laws and suppress domestic violence, why may it not commit him for a breach of the peace, or for homicide, resulting from the discharge of his duties as commander in chief? And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals. Such an one may be compelled to answer, to account and to act. In other words, if, from such analogy, we once begin to shift the supreme executive power from him upon whom the constitution has conferred it to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outstart recognise the fact that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere than has the executive, under like conditions, to interfere with the courts. In the case of *Oliver v. Warmouth*, 22 La. 1, it was held (per Taliaferro, J.) that, under the division of powers, as laid down in the federal and state constitutions, the judiciary department has no jurisdiction over or right to interfere with, the independent action of the chief executive in the functions of his office, even though the act he is required to perform be purely ministerial. This is putting the matter on very high grounds, for in such case no other officer would be exempt from the mandatory power of the judiciary. No case could more forcibly exhibit the extreme reluctance of courts to interfere with the functions of the supreme executive, for the hypothesis put is the refusal of the governor to perform a duty, cast upon him by law, of a character strictly ministerial. We think, however, that the ground upon which this decision stands is substantial; for, as the learned justice well argues, the difficulty arises in the attempt to establish a distinction between ministerial and discretionary acts as applied to the governor, and then to conclude that the former may be enforced by judicial decree. It is objected, however,

that the doctrine is unsound in this: that it gives to the judiciary the large discretion of determining the character of all acts to be performed by the chief executive; that this would infringe his right to use his own discretion in determining the very same question; that he must, necessarily, have the unconditional power of deciding what acts his duties require him to perform, otherwise his functions are trammelled and the executive branch of the government is made subservient to the judiciary. The principle enunciated in the above-stated case applies with greater force to that we now have under consideration; for if the governor's discretion may not be interfered with in a matter purely ministerial, much more may that discretion not be interfered with in a case which pertains to his office and duties as commander in chief, in the discharge of which the constitution makes that discretion his peculiar and absolute prerogative.

Again, the governor, having a proper regard for the dignity and welfare of the people of the commonwealth, is not likely to submit himself to imprisonment on the decree of the court of quarter sessions, or to permit his officers and coadjutors to be thus imprisoned. Were we, then, to permit the attempt to enforce this attachment, an unseemly conflict must result between the executive and judicial departments of the government. We need not say that prudence would dictate the avoidance of a catastrophe such as here indicated. On this point the case of *Thompson v. German Val. R. Co.*, 22 N. J. Eq. 111, furnishes us with a precedent well worthy of our consideration. In that case a subpoena duces tecum had been served on the governor of New Jersey, commanding him, by his individual name, to appear and testify before an examiner of the court of chancery, and bring with him an engrossed copy of a private statute which had been passed by the legislature, and had been sent to him, as governor, for his approval. He refused to obey the subpoena, informing the court at the same time that he did not refuse out of any disrespect to the court or to the law, but because he thought his duty required him not to appear or produce the paper required, or to submit his official acts as governor to the scrutiny of any court. It will be seen that the case thus presented is quite as strong as that under discussion; for the governor, upon his own opinion of duty, which, as it will appear, did not accord with that of the court, not only refused to appear or produce the required paper, but to submit any of his official acts to the scrutiny of the court. An order was granted on the governor to show cause why he should not appear and testify. After argument, *Zabriskie, Ch.*, said: "The governor cannot be examined as to his reasons for not signing the bill, nor as to his action, in any respect, regarding it. But there is no reason why he should not be called upon to

testify as to the time it was delivered to him. That is a bare fact that includes no action on his part. To this extent, at least, I am of opinion that he is bound to appear and testify. But I will make no order on him for that purpose. Such order ought not to be made against the executive of the state, because it might bring the executive in conflict with the judiciary. If the executive thinks he ought to testify in compliance with the opinion of the court, he will do so without order; if he thinks it to be his official duty, in protecting the rights and dignity of his office, he will not comply, even if directed by an order. And in his case the court would hardly entertain proceedings to compel him by adjudging him in contempt. It will be presumed the chief magistrate intends no contempt, out that his action is in accordance with his official duty." If we adopt this opinion as a sound exposition of the law, the case before us is determined; for the matter is left to rest solely on the opinion of the executive, although his opinion be clearly contrary to that of the court. We are inclined to think the conclusion thus reached is wise and discreet, and it is supported by the best text writers of our times. These state the law to be that the president of the United States, the governors of the several states, and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, in their own judgment, the disclosure would, on public grounds, be inexpedient. 1 Greenl. Ev. § 251; 1 Whart. Ev. § 604. Thus the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession. The doctrine that the officer must appear and submit the required information or papers to the court for its judgment as to whether they are or are not proper matters for revelation, is successfully met and settled in the case of *Beaton v. Skene*, 5 Hurl. & N. 838, per Pollock, C. B. It was there held that, if the production of a state paper would be injurious to the public interest, the public welfare must be preferred to that of the private suitor. The question then arose, how was this to be determined? It must be determined either by the judge or by the responsible crown officer who has the paper. But the judge could come to no conclusion without ascertaining what the document was, or why its publication would be injurious to the public service. Just here, however, occurred this difficulty: that, as judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent. The conclusion reached was that, from necessity, if for no other reason, the question must be left to the judgment of the officer.

A like case is that of *Gray v. Pentland*, 2 Serg. & R. 23. A subpoena had been issued from the court below and served upon Governor Snyder and Secretary Boileau, with a *duces tecum*. A rule was also entered for the purpose of taking their depositions in Harrisburg. They declined to appear in answer to the subpoena, or to permit their depositions to be taken under the rule, and refused to produce the paper or deliver it to the plaintiff. This paper was of a very great importance, inasmuch as its production was necessary for the maintenance of the suit pending, the supreme court holding that, though it was beyond the plaintiff's power, parol evidence of its contents was not admissible. A motion was then made, on the part of the plaintiff, for a special subpoena *duces tecum* to compel the production of the paper; but this was refused. On argument in the superior court this action of the court below in refusing compulsory process against the governor and secretary of the commonwealth does not seem to have been questioned; on the other hand, it was approved in opinions delivered by Tilghman, C. J., and Brackenridge, J. The latter was, as he said, inclined to think that the governor could not be compelled to produce the paper transmitted to him; that it was within his own discretion to furnish or refuse it; and this on the ground of public policy. The chief justice observed, *inter alia*, that the governor, who best knew the circumstances under which the charge had been exhibited to him, and could best judge the motives of the accuser, must exercise his own judgment with respect to the propriety of producing the writing. Thus the matter is treated as quite beyond the power of the court, and the judgment of the executive is regarded as absolute and final.

We next refer to the celebrated trial of Aaron Burr. Here is the case of one charged with treason; one who, by the express terms of the constitution, was entitled to compulsory process for obtaining witnesses in his favor. The judge before whom the examination was conducted was John Marshall, chief justice of the supreme court; a man renowned, not only for his legal learning, but also for his judgment and sagacity as a statesman; and the president was Thomas Jefferson, one not likely unduly to exalt executive prerogative, or to refuse to the judiciary its just tribute of respect. We may therefore presume that whatever was done by the principal actors in the remarkable judicial drama then in progress was well done. At the request of the defence a subpoena *duces tecum* was awarded and directed to the president, requiring him to appear, and bring with him a certain letter from General Wilkinson to himself. He refused either to appear or produce the paper required. On discussion of the question, not whether compulsory process should be awarded against the president, for that was

not so much as proposed, but whether the attorney general should permit the defence to have the examination of a copy of the required letter which had been put into his possession, the chief justice said (as we find it set down in volume 3, p. 37, Burr's Trial, as published by Westcott & Co., Washington City, 1870): "I suppose it will not be alleged in this case that the president ought to be considered as having offered a contempt to the court in consequence of his not having attended, notwithstanding the subpoena was awarded agreeably to the demand of the defendant. The court would, indeed, not be asked to proceed as in the case of an ordinary individual." We find, also, in volume 2, p. 536, of the same trial, published by Hopkins & Earle, Philadelphia, 1808, the following recorded as the utterance of the chief justice: "In no case of this kind would the court be required to proceed against the president as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. * * * In this case, however, the president has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it he himself is the judge."

Influenced by this and the other precedents we have cited, as well as by reason and necessity, we are in like manner disposed to conclude that the propriety of withholding the information required by the grand jury must be determined by the governor himself; and the weight of the reasons influencing him in the conclusion at which he has arrived is for himself, and not for the court, to consider.

Furthermore, as the governor is the chief executive of the commonwealth, and as such embodies the power of the people, for the conservation of the peace and the protection of the rights and property of the citizens of the state, as he is also part of the legislative branch of the government, it must be obvious to every one that there are times when he must be excused from the ordinary process of the courts. We presume it will not be contended that he would be obliged to obey the mandate of a subpoena during the sessions of the legislature, when his presence at the capital is constantly required, or whilst engaged in the suppression of an insurrection. These, however, do not embrace all his duties as governor. We must, therefore, go one step further, and concede that he is exempt from such process whenever engaged in any duty pertaining to his office. Granting that there may be times when he is not so engaged, and when he might be free to answer to a subpoena, who is to be the judge of his engagements or disengage-

ments? May he be compelled to appear before a court and submit himself to the judgment thereof as to whether his duties, just then, require him to be in his office at Harrisburg, or at the head of the army in the field, or whether he may not have a few days of leisure, during which he may await the will and pleasure of a grand jury? It will be conceded that in all ordinary cases he must himself judge as to what things he must do and what things he must leave undone, and that this is a duty imposed upon him by the constitution. But how, then, shall a court at any time step in and assume the power of judging for him? This cannot be done except by an unwarrantable assumption of executive prerogative. The same reasoning which brings us to the conclusion that the governor is the absolute judge of what official communications to himself or his department may or may not be revealed, in like manner leads us to conclude that he must be the sole judge, not only of what his official duties are, but also of the time when they should be attended to. The governor, disavowing any disrespect to the court or its process, has answered that, in consequence of his constant communication with the state forces, now in the field, in the disorderly and riotous districts, his time is fully occupied in the discharge of the duties of his office, and that to leave his post would endanger the interests of the public service. This brings us face to face with the question whether the executive, or the courts for him, are to determine the character of his official duties, and the order in which they may be performed. For instance, is obedience to a subpoena one of his duties, and, if so, shall he discharge that duty in preference to that which rests upon him as commander in chief? The answer to this question is easy; for if the courts can in any one instance or at any one time control or direct the executive in the performance of his duties, they may do so in every instance and at all times. We need not waste time in the attempt to prove that this proposition is not allowable; that the governor cannot thus be placed under the guardianship and tutelage of the courts. To the people, under the methods prescribed by law, not to the courts, is he answerable for his doings or misdoings. It is his duty from time to time "to give to the general assembly information of the state of the commonwealth," but it is not his duty to render such an account to the grand jury of Allegheny or any other county. Whilst, therefore, the motives of the court of quarter sessions in granting the process before us are not to be lightly impugned, yet we have no doubt it exceeded its jurisdiction in attempting to interfere with the executive prerogative.

Let the attachment be set aside.

ALEXANDER v. UNITED STATES.

(11 Sup. Ct. 350, 138 U. S. 353.)

Supreme Court of the United States. Feb. 2, 1891.

In error to the circuit court of the United States for the western district of Arkansas.

This was a writ of error sued out under the sixth section of the act of February 6, 1889, (25 St. 656,) to review a judgment of the circuit court of the United States for the western district of Arkansas, imposing a sentence of death upon the plaintiff in error for the murder of David C. Steadman "at the Creek Nation in the Indian country."

The plaintiff in error relied upon the following grounds for reversal:

(1) That the court erred in its selection of the jury, in that the defendant was required to make his challenges without first knowing what challenges the government's attorney had made, and thus challenged two jurors, to-wit, C. F. Needles and Samuel Lawrence, who were also challenged by the government, whereby he was deprived of two of his challenges contrary to law.

(2) That the court erred in excluding the testimony offered by the defendant to prove threats to kill Steadman made by House and others, while they were hunting Steadman under the belief that he had seduced the wife of the said House and was secreting himself with her in the neighborhood.

(3) Because the court erred in admitting the testimony of J. G. Ralls as to confidential communications made to him as the attorney of the defendant.

A. H. Garland and Heber J. May, for plaintiff in error. *Sol. Gen. Taft*, for the United States.

Mr. Justice BROWN, after stating the facts as above, delivered the opinion of the court.

1. With regard to the first error assigned, it appears from the record that "the court directed two lists of thirty-seven qualified jurors to be made out by the clerk, and one given to the district attorney and one to the counsel for the defendant; and the court further directed each side to proceed with its challenges independent of the other, and without knowledge on the part of either as to what challenges had been made by the other,—to which method of proceeding in that regard defendant at the time offered no objections, but proceeded to make his challenges, and in so doing challenged two jurors, to-wit, C. F. Needles and Samuel Lawrence, who had been also challenged by the government." We do not deem it necessary to inquire whether there was error in the method pursued by the court in impaneling this jury. It appears distinctly from the bill of exceptions that the defendant offered no objection to it at the time, and made no demand to challenge any of the jury beyond the 20 allowed by Rev. St. § 819. Indeed, it does not clearly appear which side made the first challenges, or that defendant had not exhausted his challenges before the

government challenged the two jurors in question. If it were a fact that the defendant had made his 20 challenges before the government challenged these two men, it is difficult to see how his rights were prejudiced by the action of the district attorney.

But the decisive answer to this assignment is that the attention of the court does not seem to have been called to it until after the conviction, when the defendant made it a ground of his motion for a new trial. It is the duty of counsel seasonably to call the attention of the court to any error in impaneling the jury, in admitting testimony, or in any other proceeding during the trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception. *Stoddard v. Chambers*, 2 How. 284; *De Sobry v. Nicholson* 3 Wall. 420; *Railroad Co. v. Hart*, 114 U. S. 654, 5 Sup. Ct. Rep. 1127; *Thomp. Trials*, §§ 690, 693, 700.

2. To understand fully the force of the second error assigned, it is necessary to state so much of the evidence as exhibits substantially the case made out by the government. The evidence tended to show that the defendant and the deceased, Steadman, had agreed to go into the stock business together, and, upon the day of the murder, were endeavoring to rent a farm for the purpose of wintering their horses, and making a crop the following year. They were returning to their camp both armed with guns. Defendant was also armed with a pistol. So far as the evidence discloses, Steadman disappeared and was never seen alive again. A few minutes after they were last seen, a witness, who had met them, saw the two horses, without riders, standing in the road near a wood. Shortly after, eight or nine shots were heard in the wood, and after this the defendant was seen upon the road, sitting upon one of the horses, and leading the other, which had no rider. In about 12 days the body of Steadman was found half a mile from the place from where he and defendant had been seen, and within 75 yards of the place where the horses were seen standing. His skull was crushed, and there was a bullet hole in it back of the ear. There was also evidence that Steadman had a large amount of money on his person at the time he disappeared. The defendant offered contradictory explanations of Steadman's disappearance. At one time said he had probably been killed, and at another time suggested suicide, and at another pretended to believe a story that had been circulated in the neighborhood that Steadman and a married woman by the name of House had disappeared and were hiding together. Evidence was admitted tending to show that Mrs. House and Steadman had been seen in conference the day before, and that the general impression in the neighborhood at the time was that they had gone off together. House and his friends had armed themselves with guns and pistols and had ridden through the country hunting for them, under the belief that they were hiding together in the neighborhood, or had fled the country together.

Now, if evidence was admitted to show

that House had armed himself, and was hunting for Steadman, under the impression that the latter had eloped with his wife, and was secreting himself in that vicinity, it is difficult to see upon what principle his threats in that connection were excluded. Accepting the theory of the government that mere threats, unaccompanied by acts of a threatening nature, were irrelevant to the question of defendant's guilt, it is not easy to understand how the acts themselves could be made pertinent without testimony tending to show the reason why House had armed himself, and, with other parties, was scouring the country for Steadman. Their statements in that connection would be clearly illustrative of the act in question, and a part of the *res gestæ*, within the rule laid down in Lord George Gordon's Case, 1 Greenl. Ev. § 108, and within all the authorities upon the subject of declarations as part of the *res gestæ*.

At the same time we recognize a certain discretion on the part of the trial judge to rule out this entire testimony, both of the acts and the declarations of House, if, in his opinion, they were so remote or insignificant as to have no legitimate tendency to show that House could have committed the murder. If, for instance, it were clearly proven that the murder was committed before the threats of House were uttered, or the two occurrences were so remote in time and place as to demonstrate that there could have been no connection between them, it would be the duty of the court to exclude the testimony. But if, on the other hand, the time and the circumstances attending the murder were uncertain or obscure, the conduct and threats of House might have a material bearing upon the identification of the murderer. It is held by some of the authorities that the question whether such evidence should be admitted or excluded is, to a certain extent, a matter of discretion with the trial judge. *Shailer v. Bumstead*, 99 Mass. 112; *Thayer v. Thayer*, 101 Mass. 111; *Com. v. Abbott*, 130 Mass. 472; *Com. v. Ryan*, 134 Mass. 223; *McIntire v. State*, 20 Tex. App. 335.

In the present case, however, it is assumed, both in the exception noted to the exclusion of the testimony and in the briefs of counsel, to have been proven as a fact, by the witness Terry, that on the day of the disappearance of Steadman and Mrs. House, he saw Samuel House, her husband, and several others, relatives and friends of House, riding around the neighborhood armed with Winchester guns and pistols, hunting for deceased and Mrs. House, who were then believed to have eloped together, or to be secreting themselves in the neighborhood; and although the testimony of Terry, as set forth in the bill of exceptions, fails to support this statement, or to show definitely what he did intend to swear to, yet, assuming it to be as stated, we think that, if it were shown that House was in search of Steadman, his declarations as to his purpose in so doing stand upon the same basis, with regard to admissibility, as his conduct, and were a part of the *res gestæ*. But in the view we take of the next assignment

we find it unnecessary to determine whether there was such error in ruling out this testimony as to require a reversal.

3. The third assignment relates to the admission of the testimony of J. G. Ralls, an attorney at law, to which objection was made upon the ground that it related to a confidential communication made by the defendant, who had consulted Ralls as an attorney at law, and was therefore privileged. Ralls stated in substance that he was practicing law at Muscogee; that defendant came to his office there between the time of Steadman's disappearance and the finding of his body, "and asked me if I was an attorney. I told him I was. He said his name was Alexander, and he went on to state that he and his partner had some forty head of horses across the river, in partnership, and that some time before that, probably a week before, his partner was missing, and he hadn't heard from him. He says his partner had a brother in California, and he was afraid his brother would come up there and make some trouble about the horses. He stated at the time his partner had taken off the money, and he wanted to know if he could hold the horses so as to secure his part of the money. I asked him if the horses would pay him for his part, and he said they would. I told him to hold the horses. They could not take them until that was settled." It is evident from this statement that defendant consulted with Ralls as a legal adviser, and while, if he were guilty of the murder, it may have had a tendency to show an effort on his part to defraud his partner's estate, and to make profit out of his death, by appropriating to himself the partnership property, it did not necessarily have that tendency, and was clearly a privileged communication. If he consulted him in the capacity of an attorney, and the communication was in the course of his employment, and may be supposed to have been drawn out in consequence of the relations of the parties to each other, neither the payment of a fee nor the pendency of litigation was necessary to entitle him to the privilege. *Williams v. Fitch*, 18 N. Y. 546; *Britton v. Lorenz*, 45 N. Y. 51; *Bacon v. Frisbie*, 80 N. Y. 394; *Andrews v. Simms*, 33 Ark. 771.

In the language of Mr. Justice STORY, speaking for this court in *Chirac v. Reinicker*, 11 Wheat. 280, 294: "Whatever facts, therefore, are communicated by a client to a counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent."

We are referred, however, to the case of *Queen v. Cox*, 14 Q. B. Div. 153, as holding the doctrine that, where a communication is made to counsel in furtherance of a scheme to commit a crime, the client is not entitled to the privilege. This was a crown case reserved and argued before 10 judges of the queen's bench division. The defendants Cox and Railton were indicted for a conspiracy to defraud one Munster. The facts stated show that Munster had obtained a judgment against Railton in an action for libel, upon which an execution had issued, which the sheriff

proposed to levy upon the defendant's stock in trade. He was met, however, by a bill of sale from Railton to Cox, the other defendant, antedating the execution. It was claimed that the bill of sale was fraudulent, and made for the purpose of depriving Munster of his rights under the judgment, and Railton and Cox were indicted for conspiracy. The question was whether an interview had by Railton and Cox with Goodman, a solicitor, as to what could be done to prevent the property from being seized under execution, was competent evidence, or was a privileged communication. No point was made that Goodman was not consulted as an attorney. The court unanimously held that the evidence was competent. Mr. Justice STEPHEN, who delivered the opinion of the court, said, in a very exhaustive discussion, that the question was "whether, if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted, the communication between the two is privileged. We expressed our opinion at the end of the argument that no such privilege existed. If it did, the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and that the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his criminal purpose." After citing and commenting upon a large number of cases, he comes to the conclusion that, if the communication be made in furtherance of any criminal or fraudulent purpose, it is not privileged. This case, however, is clearly distinguishable from the one under consideration, in the fact that the solicitor was consulted with regard to a scheme to defraud, for which he was subsequently indicted and tried, and the testimony was offered upon that trial; while in this case the consultation was

had after the crime was committed, and was offered in evidence as an admission tending to show that defendant was concerned in the crime, or rather as a statement contradictory to one he had made upon the stand. Had he been indicted and tried for a fraudulent disposition of his partner's property, the case of *Queen v. Cox* would have been an authority in favor of admitting this testimony, but we think the rule announced in that case should be limited to cases where the party is tried for the crime in furtherance of which the communication was made.

Had the interview in this case been held for the purpose of preparing his defense, or even for devising a scheme to escape the consequences of his crime, there could be no doubt of its being privileged, although he had made the same statement that his partner was missing and he had not heard from him. Now, the communication in question was perfectly harmless upon its face. If it were true that his partner was missing, and he had not heard from him, and that Steadman had taken off the money, there was no impropriety in his consulting counsel for the purpose of ascertaining if he could hold the horses, so as to secure his part of it. Ralls asked him in that connection if the horses would pay him for his part, and defendant said they would. He then told him to hold the horses; that they could not take them until that was settled.

It is only by assuming that he was guilty of the murder that his scheme to defraud his partner becomes at all manifest. His statement that his partner was missing and that he had not heard from him is the only material or relevant part of the conversation, and was plainly privileged.

The judgment of the court below must be reversed, and the case remanded for a new trial.

GRAY, J., was not present at the argument, and took no part in the decision of this case.

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SWAIM v. HUMPHREYS et al.

(42 Ill. App. 370.)

Appellate Court of Illinois. Nov. 25, 1891.

Error to circuit court, McLean county;
Owen T. Reeves, Judge.

Thomas F. Tipton, for plaintiff in error.
Kerrick, Lucas & Spencer, for defendants in error.

BOGGS, J. This case has been twice before in this court. *Swaim v. Humphreys*, 15 Ill. App. 451; *Humphreys v. Swaim*, 21 Ill. App. 231.

Plaintiff in error, then sheriff of McLean county, received an execution issued by the circuit clerk of that county upon a judgment confessed in vacation by J. S. Arnspeiger and S. R. Lovell in favor of N. N. Winslow, and by virtue thereof levied upon certain groceries and provisions belonging to the defendants in the execution, being part of their stock in trade, they being retail grocers in Bloomington. Defendants in error, who were wholesale grocers in Bloomington, had sold and delivered to Arnspeiger & Lovell the goods levied upon, and to secure the amount due them therefor, had received a chattel mortgage upon the stock of groceries, etc., and they instituted this suit in replevin against the sheriff to recover possession of the goods.

The chattel mortgage permitted the mortgagors to retain possession of the mortgaged property, and to sell same in regular course of trade, and, being for that reason regarded as void, defendants in error sought in the first trial in the circuit court to recover the goods on the ground that they had been induced to sell and deliver them to Arnspeiger & Lovell by false and fraudulent representations on the part of that firm as to their financial condition and commercial standing, and upon that theory they succeeded upon the hearing.

Plaintiff in error brought the case to this court, and it was held (15 Ill. App. 451) that the evidence did not support the findings of the circuit court on this issue of fraud, and the judgment was reversed and cause remanded.

Upon the hearing of the case the second time in the circuit court, defendants in error claimed that the execution by virtue of which the sheriff held the property was issued before the judgment upon which it was based had been entered of record, and in support of such claim offered oral testimony, which, upon the objection of the plaintiff in error, was rejected by the court, and the second trial resulted adversely to the defendants in error, from which they prosecuted an appeal to this court. Upon consideration of the question thus presented it was held by this court: First, that an execution upon a judgment confessed in vacation is void if issued before the judgment is actually entered of

record; second, that oral evidence is admissible to prove that an execution was issued and was in fact in the hands of the sheriff before the judgment was written up. The circuit court having erroneously refused to permit such oral evidence to be heard, its judgment was reversed, and the cause again remanded. *Humphreys v. Swaim*, 21 Ill. App. 232.

The cause has again been heard in the circuit court, the result being a judgment in favor of defendants in error, to reverse which the writ of error now before us is prosecuted.

The material questions arising upon the present record are: First. Was William E. Hughes properly required to testify as to whether the judgment had been entered of record when the execution was issued? Second. Could defendants in error, if their mortgage was void as to execution creditors, have judgment for the recovery of the property?

Counsel for plaintiff in error also insist that oral testimony is not competent to be received to show that the judgment had not been written of record when the execution issued, but, as this court in this same case (21 Ill. App. 232) has expressly held that such evidence is admissible, we must decline to again consider, but will adhere to the rule there announced.

William E. Hughes was introduced in the circuit court as a witness for defendants in error. He testified that he was an attorney for the plaintiff in error, and was also attorney for Winslow, the execution creditor. That as such attorney for Winslow he prepared the declaration and cognovit upon which the judgment in question was rendered, and presented them to the clerk, and performed such other duties as were professionally required to entitle his client to a judgment in vacation. As such attorney he requested that execution be issued on the judgment, which was done by the clerk, and the same handed by the clerk to him. After these facts were elicited, the witness was asked if the clerk had written up the judgment before the execution was issued. To this the plaintiff in error objected on the ground that it was by reason of his professional relation to Winslow that the witness had obtained whatever knowledge he might have of the matter desired to be inquired into, and that it was therefore privileged from disclosure by him. This objection was overruled, and the witness required to answer.

The testimony of the witness established the fact to be that before the judgment had been entered of record by the clerk the execution was issued and delivered to the witness, who immediately placed it in the hands of the sheriff.

The rule is well settled that an attorney will not be compelled, or even allowed, against the objection of the client, to disclose anything communicated by his client to him

in his professional capacity, and the reason on which the rule rests is that it is in the interest of justice that the most full, free, and complete communication should take place between attorney and client. It is not, however, in the interest of justice to extend this privilege so that by its operation the truth in relation to facts otherwise in the knowledge of an attorney be suppressed. When desiring to define its breadth and limits, Mr. Greenleaf says: "The great object of the rule seems to plainly require that the entire professional intercourse between client and attorney, whatever it may have consisted in, should be protected by profound secrecy." 1 Greenl. Ev. § 240.

"The privilege," it is said in Best on Evidence (section 281), "does not extend to matters of fact which the attorney knows by other means than confidential communications with his client, even though, if he had not been employed as attorney, he probably would not have known them." In effect the same is held in *Bridge Co. v. Jameson*, 48 Ill. 283; *Crosby v. Berger*, 4 Edw. Ch. 254; *Denbrough v. Rawlins*, 3 Mylne & K. 505; 1 Greenl. Ev. § 244.

The fact which Mr. Hughes was called upon to disclose did not arise from, and had no connection with, the professional intercourse between himself and his client. It was not in its nature or character either private or confidential. It was not an act done by the client, or by his agent or servant, or any one acting in his behalf.

The witness, in the discharge of professional duty, had indeed been called to the office of the clerk of the circuit court. He placed papers in the hands of the clerk which required of the clerk the performance of an official duty, in the discharge whereof he sustained no confidential relation whatever to the witness of his client. It became important to know what official act the clerk there performed; and of this the witness had knowledge. Such knowledge was not obtained by the witness in any wise from the client, nor from professional intercourse with him. The privilege of secrecy does not extend and cover information and knowledge thus obtained, and the circuit court ruled correctly in requiring the witness to answer.

It is clear that the execution issued before there was a judgment of record to support it. The execution was therefore void, and the possession of the goods by the sheriff under it unauthorized. 21 Ill. App. 231, *supra*.

The chattel mortgage, upon which must rest the right of defendant in error to possession of the goods in question, was not valid as against the rights and interests of third persons. As between the parties to it, the mortgage was good and effectual; and if the sheriff had no legal writ wherewith to seize the property, it must be surrendered by him to the owners, or to the defendants in error, if they have superior right as between themselves and the owners. The judgment must be affirmed.

Judgment affirmed.

In re COLEMAN'S WILL.

(19 N. E. 71, 111 N. Y. 220.)

Court of Appeals of New York. Nov. 27, 1888.

Appeal from supreme court, general term, Third department.

James C. Rogers, for appellants. A. D. Wait, for respondent.

RUGER, C. J. The probate of the will of William Coleman, deceased, was contested before the surrogate by his widow and several of his children and grandchildren, upon the ground that he was not of sound mind and memory at the time of its execution, and its execution was procured through undue influence, fraud, and intimidation exercised over him by Robert S. Coleman. The will was admitted to probate, and the decree was affirmed upon appeal by the general term. It is urged upon this appeal that the evidence produced before the surrogate by the contestants, as to the mental and physical weakness and incompetency of the testator to make a valid will, is so strong and conclusive that this court should reverse the decision of the court below upon the facts. It is not our purpose to go into a detailed history of the evidence, or comment upon the weight and force of the various facts and circumstances proved on the trial by the respective parties to sustain their several positions, as it is not even claimed by the appellants that there was no evidence to support the decree of the surrogate. Their utmost contention is that the evidence on the part of the contestants is so persuasive and convincing, either of the mental incompetency of the testator or of the exercise of undue influence by the proponent in procuring the execution of the will, that the court should hold as matter of law that it was error for the surrogate to admit it to probate. The argument of the appellants is based, to a large extent, upon evidence which was admitted on the trial against the objections of the proponent, and which we deem to be clearly inadmissible. While we consider the case made by the contestants upon the evidence to be very strong, and as presenting a serious question whether the testator was competent to make a valid will or not, yet the exclusion of the evidence improperly received on their behalf by the surrogate very much impairs the force and strength of their case, and leaves the evidence as to the testator's competency more nearly balanced than it would otherwise have been.

A general outline of the facts will be sufficient to present the views we deem it necessary to express upon the determination of this appeal. Robert S. Coleman, the only son of the testator, was the proponent of the will, and one of the three executors named therein; the others having renounced or declined to act in that capacity. The testator

at the time of its execution was upwards of 80 years of age, and died within a year thereafter. He was then possessed of property mainly consisting of real estate of the value of about \$40,000, and had several children and grandchildren who were in needy circumstances, partially dependent upon him for support; but were not mentioned in or provided for by the will, although apparently the natural objects of his bounty. That instrument, after making slight provision for two of his grandchildren, gave his personal property, together with a life-estate in his homestead, to his widow, and the remainder thereof, together with a remainder in the homestead, to the proponent. Robert was by profession a lawyer, and although living in his father's family, and being supported by him until he was nearly 40 years of age, had never rendered material assistance to the testator in his business affairs, and was not apparently regarded by him with favor, or as a proper or fit person to have the management and control of business such as that in which the testator had theretofore been engaged.

Upon the trial much evidence was given upon both sides in regard to the mental and physical condition of the testator during the three or four years preceding his death; but no direct evidence was produced as to any effort on the part of the proponent to procure the making of a will by his father, or to influence or dictate the nature of its provisions. The proof on the part of the contestants as to the exercise of undue influence is based wholly upon inference sought to be drawn from the apparently unfriendly relations existing between the testator and his son; the alleged unnatural and inequitable disposition of the property; the advanced age of the testator; and the absence of any apparent reason, except the assumed existence of some extraneous influence, for excluding the other children from a share in his estate. There was much evidence produced by the contestants as to the impairment of the mental and physical condition of the testator subsequent to 1877, when it was claimed that he had experienced a paralytic affection which caused a gradual but continuous impairment of his faculties down to the time of his death, in April, 1881. The evidence was met on the part of the proponent by nearly an equal number of witnesses, who testified to facts and circumstances showing the continued mental soundness of the testator's faculties, and his capacity to transact business affairs, until after the execution of the will.

The evidence on the part of the contestants is subject to the criticism that much of it was given under the objection of the proponent, and was of doubtful admissibility upon the questions litigated. Aside from the evidence of Mrs. Coleman, the most material and important facts on the part of the contestants were undoubtedly proved by the

witnesses Mrs. Seelye, the daughter of the testator, and the two physicians, Drs. Clark and Little, who testified to the unsoundness of mind of the testator during the year 1877, and subsequent thereto, from knowledge acquired by them while attending him, respectively, in a professional capacity. This evidence was duly objected to by the proponent, but was admitted against such objection. So far as the evidence of the medical witnesses is concerned, there can be but little doubt of its inadmissibility, and it should have been disregarded by the surrogate in determining the question of the testator's mental and physical condition. It seems to us that this evidence falls clearly within the prohibition contained in section 834 of the Code, as illustrated and applied in recent decisions of this court. *Grattan v. Insurance Co.*, 80 N. Y. 296; *Edington v. Insurance Co.*, 67 N. Y. 185; *Westover v. Insurance Co.*, 99 N. Y. 56, 1 N. E. 104; *People v. Schuyler*, 106 N. Y. 318, 12 N. E. 783; *Renihan v. Dennin*, 103 N. Y. 374, 9 N. E. 320.

It is perhaps not important that we should comment upon the propriety of the rulings on the trial in reference to the evidence on the part of the contestants, since, in any event, whether it be considered or not, we are of the opinion that the question of the testator's mental condition, and the exercise of undue influence over him in respect to the execution of the will, was one of fact, to be determined by the trial court. Whatever may be said of the evidence, we are clearly of the opinion that not only was there evidence upon which the decision of the surrogate could properly be supported, but there was no such preponderance, as to the testator's mental incapacity to make a valid will, as would have authorized a reversal by an appellate tribunal of the surrogate's decree determining that fact in favor of the proponent. In *re Ross*, 87 N. Y. 514; In *re Cottrell*, 95 N. Y. 333; *Hewlett v. Elmer*, 103 N. Y. 161, 8 N. E. 387.

The most material question in the case arises over the exception taken by the contestants to the admission of the evidence of the witnesses Hughes and Northrup as to conversations had by them, respectively, with the testator at the time of receiving instructions in reference to a draft of the will offered for probate, and another drawn about two years previously by the same attorneys. The testimony given by these witnesses was undoubtedly very material and important in its bearing upon the issue tried, and if erroneously admitted would lead to a reversal of the judgment appealed from. The evidence showed that the witnesses were a firm of lawyers residing at Sandy Hill, and were employed by the testator in their professional capacity to draw such wills, and that the conversations testified to were had with them for the purpose of enabling them to execute the instructions of the testator. That

these interviews were had in pursuance of, and under the sanction of, a professional employment, and that communications made by a client under such circumstances to his attorney were clearly within the protection of the statute, we have no doubt. *Westover v. Insurance Co.*, supra; *Renihan v. Dennin*, supra; section 835, Code Civ. Proc.

The prohibition of the statute, therefore, applies to these communications, and they were inadmissible as evidence unless brought within the provisions of section 836 authorizing their disclosure. By that section the pledge of secrecy imposed by the statute is to be observed, unless its provisions "are expressly waived" by the client. There is nothing in this section requiring the waiver to be made in writing, or in any particular form or manner, or at any particular time or place; but it is required to be an express waiver, and made in such manner as to show that the testator intended to exempt his attorneys in the particular instance from the prohibition imposed by the statute. An examination of the will itself, as well as the evidence of all of the witnesses present on the occasion of its execution, concur in establishing the fact that the testator requested both Hughes and Northrup to sign the attestation clause of his first as well as of his second will, as witnesses thereto. That request implies, not only information as to the necessity of such signatures to the validity of the instrument executed, but also knowledge of the obligations which they assumed in respect to the proof thereof after his death. He must have been aware that his object in making a will might prove to be ineffectual, unless these witnesses could be called to testify to the circumstances attending its execution, including the condition of his mental faculties at that time.

The condition of the testator's mind, as evidenced by his actions, conduct, and conversation at the time of making a will, is a part of the *res gestæ* of the transaction, and witnesses thereto are competent to speak thereof, and give opinions in relation thereto, without any other knowledge thereof except that derived from his conduct on such occasions. *Clapp v. Fullerton*, 34 N. Y. 190; *Holcomb v. Holcomb*, 95 N. Y. 316. The law presumes knowledge on his part of its provisions, and that what he does deliberately is done with a full comprehension of the legal effect of his act, and the duty which it imposes upon those who comply with his request. It would be contrary to settled rules of law to ascribe to the testator an intention, while making his will, and going through the forms required to make it a valid instrument, to leave in operation the provisions of statute which he had power to waive, but which if not waived might frustrate and defeat the whole object of his action. It cannot be doubted that if a client in his life-time should call his attorney as a witness in a legal proceeding to testify to transactions

taking place between himself and his attorney while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute; and can it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts learned through their professional relations, upon a judicial proceeding to take place after his death? We think not. *McKinney v. Railroad Co.*, 104 N. Y. 352, 10 N. E. 544. The act of the testator in requesting his attorneys to become witnesses to his will leaves no doubt as to

his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove. We have carefully examined other points made by the appellants upon the argument, and in the printed brief submitted to the court, but find no material error committed by the trial court which entitles the appellants to a reversal of the judgment.

The judgment should therefore be affirmed, with costs.

All concur.

HURLBURT et al. v. HURLBURT.

(28 N. E. 651, 128 N. Y. 420.)

Court of Appeals of New York. Oct. 13, 1891.

Appeal from supreme court, general term, fifth department.

Action for money had and received, brought by Lyman F. Hurlburt and another, administrators of Charles F. Hurlburt, deceased, against Ella Hurlburt, administratrix of Theron D. Hurlburt, deceased. Verdict for defendant. Judgment was ordered for defendant on plaintiffs' motion for a new trial on exceptions ordered to be heard at the general term in the first instance. Plaintiffs appealed. Affirmed.

Charles McLouth, for appellants. S. B. McIntyre, for respondent.

EARL, J. This action was brought to recover the sum of \$6,682, with interest thereon, which it is alleged Charles F. Hurlburt, the plaintiffs' intestate, placed in the hands of his son Theron, the defendant's intestate, as his agent, and for his benefit, in the latter part of the year 1881. Theron was a son of Charles, and he died December 25, 1883, and Charles died January 6, 1884. The defendant claimed that the money was a gift to her husband, and that he was never under any obligation to repay the same. The plaintiffs were unable to produce any writing of any kind evidencing any obligation on the part of Theron to repay the money. They are the sons of Charles, and were the sole witnesses to establish their claim, and this they attempted to do by testifying to certain conversations which they overheard between their father and Theron. Upon the trial the defendant rested her case mainly upon the conceded fact that for about two years before the death of her husband the money claimed had been in banks to his credit, and had been managed and controlled by him, and she produced proof of various declarations and admissions made by Charles, tending to show that the money was transferred by him to his son as a gift, and not to be held for his benefit.

During the progress of the trial the plaintiffs made objections to evidence which were overruled, and they now claim some of the rulings were erroneous. We will briefly notice some of them. Theron and Charles, in the spring of 1883, went together to consult a lawyer by the name of Aldrich as to the best mode of disposing of or adjusting the prospective interest of the plaintiff Lyman as an heir in the farm belonging to his father, and several plans were suggested by Theron, in the presence of his father, and assented to by him, to accomplish that end. The statement was there made by Theron to the lawyer, and assented to by his father, that Lyman had had all his share in his father's personal property; and other statements were there made by Theron, and assented to by his father, of similar import. Aldrich was called by the defendant to prove these statements and admissions. The plaintiffs objected to his evidence on the ground that he was an attorney, consulted professionally, and that the com-

munications to him were privileged. The court overruled the objection, and received the evidence. We think that in receiving this evidence there was no violation of section 835 of the Code, which provides that "an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." This section is a mere re-enactment of the common-law rule, and it cannot be supposed from the general language used that it was intended to change or enlarge that rule as it had been expounded by the courts. It has frequently been said that the object of the rule embodied in the section is to enable and encourage persons needing professional advice to disclose freely the facts in reference to which they seek advice, without fear that such facts will be made public to their disgrace or detriment by their attorney. Such a case as this is plainly not within the rule. Here Theron and his father were both interested in the advice which they sought, and they were both present at the same time, and engaged in the same conversation. Each heard what the other said, so that the disclosures made were not, as between them, confidential, and there can be no reason for treating such disclosures as privileged. It has frequently been held that the privilege secured by this rule of law does not apply to a case where two or more persons consult an attorney for their mutual benefit; that it cannot be invoked in any litigation which may thereafter arise between such persons, but can be in litigation between them and strangers. *Root v. Wright*, 21 Hun. 347; *Sherman v. Scott*, 27 Hun. 331; *Foster v. Wilkinson*, 37 Hun. 244; *Rosenburg v. Rosenberg*, 40 Hun. 91; *Whiting v. Barney*, 30 N. Y. 330; *Hebbard v. Haughian*, 70 N. Y. 54; *Root v. Wright*, 84 N. Y. 72. Therefore, if Charles and Theron had been alive, and parties to this action, this evidence would have been competent; and, as it would then have been competent, it is equally competent in this action between their personal representatives. The fact that these plaintiffs are personally interested in the estate of their father can make no difference in the application of the rule. They are parties to this action only in a representative capacity. They legally stand as the representatives of their father, and no one else. Evidence which would have been competent against him in his life-time is competent against his personal representatives. So we think that this case is not within the reason of section 835, and, even if it should be regarded as within its letter, it should be taken out of the letter by the application of the familiar maxim, "*cessante ratione legis, cessat ipsa lex*."

Several witnesses were permitted to give evidence of declarations made by the plaintiffs' intestate tending to show that he had made a gift of this money to his son, and this evidence was objected to by the plaintiffs as incompetent. It is familiar law, for which no citation of authorities is needed, that the declarations of a testator or intestate binding him or bind-

ing or impairing his estate may be given in evidence against his personal representatives in all cases where they would have been competent against himself if he had been living and a party to the action. His executor or administrator represents him and stands in his place, and his declarations admitting a debt or obligation, or tending to discharge a debt or obligation due him, or to impair his estate in any way, are competent in any litigation to which his personal representatives are a party. Therefore the evidence of material admissions made by Charles in his life-time was competent against these plaintiffs. It is further claimed that much of the evidence thus received was wholly immaterial, and should, therefore, have been excluded. We have carefully scrutinized the evidence, and, while much of it has but a slight and remote bearing upon the case, yet we cannot say that any of it was wholly immaterial. It was competent for the defendant to prove the relations between Theron and his father, and, to some extent, the dealings between them, and the relations between the father and the different members of his family.

Complaint is made of the charge of the judge. Our attention is called to no erroneous rule of law laid down by him, and

the most that can be said is that the charge shows a significant leaning in favor of the defendant, and that the judge was strongly impressed with the merits of the defendant's case. But the mere intimation of an opinion by the judge upon evidence, or upon the merits of the case, or his comments upon the evidence, though unfavorable to the party complaining, furnish no ground for a reversal here, so long as the whole case is submitted to the jury upon a charge which lays down no improper rule of law. If a judge, in his charge to the jury, uses such language as to improperly bias their judgments or influence their verdict, that may be ground for the court below, upon a motion for a new trial, to set aside the verdict if satisfied that injustice has been done; but upon an appeal to this court, where the court below has refused to set aside the verdict, and has affirmed the judgment entered thereon, we can review only errors of law which have been properly excepted to. A careful examination of the whole case leads us to the conclusion that the exceptions of the plaintiffs point out no legal error, and that there is no ground for a reversal of the judgment. The judgment should be affirmed, with costs. All concur.

MINTER v. PEOPLE.

(29 N. E. 45, 139 Ill. 363.)

Supreme Court of Illinois. Nov. 4, 1891.

Error to appellate court, Fourth district. Reversed.

Proceeding to punish F. E. Minter for contempt of court. Defendant was convicted, and the appellate court affirmed the judgment. Defendant brings error.

Pillow & Millsbaugh, for plaintiff in error. Geo. Hunt, Atty. Gen., for the People.

CRAIG, J. The plaintiff in error was subpoenaed as a witness to testify in reference to a charge under investigation before the grand jury of Gallatin county. After being sworn, the foreman of the grand jury asked the witness the following question: "Do you know of any person playing at a game with cards for money in Gallatin county within eighteen months past?" to which question he answered, "I do." The foreman then asked the following question: "(2) Who did you see playing?" which last question plaintiff in error refused to answer on the ground that he could not do so without giving evidence against and tending to criminate himself. Thereupon the foreman of the grand jury caused the plaintiff in error to be brought before the circuit court, then judicially sitting, to be dealt with as for contempt in refusing to answer said last question. Plaintiff in error appeared in open court, and stated voluntarily that the foregoing was a correct statement of the proceedings before the grand jury, and that he had answered the first question, and refused to answer the last, because to do so would criminate, or tend to criminate, himself. The court then ruled and stated to him that he was not required to give evidence against himself, nor to give evidence that would tend to criminate himself, but that he was required to answer whether or not he had seen any person other than himself play at cards for money; that he might lawfully refuse to tell anything that he himself had done, but that he could not lawfully refuse to tell what he had seen another person do. Plaintiff in error then asked if the court held that a witness before the grand jury was required to tell that he had seen others gaming for money, if the witness was also playing at the same time, and in the same game, with such other persons; and the court thereupon ruled that, under such circumstances, the witness was bound to tell that the others had played, but that he (plaintiff in error) might lawfully refuse to tell anything that he himself had done or said or anything that tended to criminate himself, but that he must tell if he had seen others play; that the fear that his answer might induce the other parties to testify against him in retaliation, or that the grand jury might summon the others, and force them to tell, was not a

lawful reason for refusing to answer the question. The plaintiff in error still refusing to answer the question, the court adjudged him in contempt of court, and assessed a fine against him of \$25 as a punishment. The judgment of the circuit court having been affirmed in the appellate court, this writ of error was sued out to reverse the latter judgment.

Article 2 of section 10 of our constitution provides: "No person shall be compelled in any criminal case to give evidence against himself." 1 Starkie, Ev. 136, says: "A witness is not bound to answer any question, either in a court of law or equity, if his answer will expose him to any criminal punishment or penal liability," agreeably to the wise and humane principle that no man is bound to criminate himself. Greenleaf, in the discussion of this question, (volume 1, § 451.) says: "Where an answer will have a tendency to expose the witness to a penal liability * * * or to a criminal charge, here the authorities are exceedingly clear that the witness is not bound to answer. If the fact as to which he is interrogated forms but one link in the chain of testimony which is to convict him, and whether it may tend to criminate or expose the witness, is a point which the court will determine, under all the circumstances of the case, but without requiring the witness fully to explain how he might be criminated by the answer which the truth would oblige him to give." In *People v. Mather*, 4 Wend. 229, it is said: "When the disclosures he [the witness] may make can be used against him to procure his conviction for a criminal offense, or to charge him with penalties and forfeitures, he may stop in answering before he arrives at the question the answer to which may show directly his moral turpitude. * * * If there be a series of questions, the answer to all of which would establish his criminality, the party cannot pick out a particular one, and say, if that be put, the answer will not criminate him. If it is one step having a tendency to criminate him, he is not compelled to answer." In 1 Burr's Tr. 424, Chief Justice Marshall, in discussing this question, said: "It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction."

It will be observed from the authorities cited that a witness is not required to go on and answer questions until one is propounded the answer to which will of itself criminate him of a crime, but if the evidence elicited tends to criminate the witness, or if it constituted a link in a chain of evidence which might criminate the witness, he may

claim his privilege, and refuse to answer. Here the grand jury was investigating the question whether certain persons had been guilty of gambling by playing with cards for money. The witness had played in a certain game with these persons, and the question presented is whether he could disclose the name of the person or persons with whom he played without furnishing a link in a chain of testimony sufficient to establish his own guilt. In other words, if A. and B. play with each other a game with cards for money, can A. testify that he saw B. play, without disclosing evidence which will form a link in a chain of testimony sufficient to convict A.? The answer to this would seem to be obvious. The testimony of A. establishes the fact that two persons played with cards for money. The name of one is given. One mere link in the chain of evidence will suffice to complete the chain, and establish the crime; that is, that A. also joined in the game. Gaming is an of-

fense that one person cannot commit alone. He must of necessity have an accomplice. Under the ruling adopted in this case, plaintiff in error was compelled to go on the stand and testify that a crime had been committed, and give the name of his accomplice, and was only allowed to withhold the fact that he was the other guilty party. We think this ruling violated that long and well established rule of law which shields a party from testifying to a fact that may criminate himself. If plaintiff in error had not been a party to the crime which the people were attempting to prove; if he had merely been in a room or place, and saw others play, —he could be compelled to testify to all he saw. But such was not the case. He was a party to the game. He and another had violated the law, and he could not be required to establish the crime by his own evidence. The judgment of the appellate and circuit courts will be reversed, and the cause remanded.

MAHANKE v. CLELAND, Judge, et al.

(41 N. W. 53, 76 Iowa, 401.)

Supreme Court of Iowa. Dec. 22, 1888.

Certiorari proceeding by Elizabeth Mahanke against John B. Cleland, judge of the district court, Twelfth judicial district of Iowa, and John Barlow, clerk of the district court in and for Butler county, Iowa, and said district court of said county, to test the validity of an order requiring the plaintiff to answer questions in regard to a certain issue involved in an action then pending, to which she was a party defendant.

Hemenway & Grundy, for petitioner.

ROBINSON, J. John Smallpage commenced an action in the district court of Butler county, in which the petitioner in this proceeding and one John Mahanke were made parties defendant. The petition in that action alleges that Smallpage is the owner of a judgment rendered by said district court against said John Mahanke, on which an execution has been issued and returned unsatisfied, and on which there is due about the sum of \$870; that before said judgment was rendered said John Mahanke, being the owner of certain lands in Butler and Grundy counties, "did make a pretended sale and conveyance, by deeds of the same," to the plaintiff in this action, "with intent to hinder, delay, and defraud the plaintiff in the collection of his said judgment;" that the plaintiff in this action "took said deeds of conveyance with the like intent, and without paying therefor any consideration." The petition prays that the conveyances be set aside, and that the land therein described be subjected to the payment of said judgment. The plaintiff in this action, by her answer, admitted the allegations in regard to the judgment, and that the conveyances specified had been made to her, but denied that they were made without consideration, and denied all allegations of fraud. While the action aforesaid was pending, the plaintiff in this action was called before a notary public, and sworn, for the purpose of taking her deposition to sustain the issues on behalf of the plaintiff Smallpage, and was asked the following question: "When did you first know that John Mahanke had made and executed to you deeds of his interest to the land left by Henry Mahanke, being the real estate described in the petition?" Thereupon the witness objected to answering such question, on the ground "that the witness is a defendant in the case; that the only issue in the case is the good faith of the conveyance made by John Mahanke to the witness, set out in the petition; and the matter sought to be elicited would render the witness liable to criminal prosecution;" and "objected to any further examination concerning issues in the case upon like grounds." The parties agreed in writing that plaintiff was seeking to prove the affirmative allegations relating

to the issue, by interrogating Elizabeth Mahanke in regard to the circumstances under which the deeds were executed by John Mahanke to her, the consideration paid by her, etc.; and that a return should be made to the court for its determination as to whether this testimony would be competent under the issue, and whether the witness would be excused, under section 3647 of the Code, from answering such questions. A return was made by the notary of the deposition, objections, and agreement. The district court overruled the objection made by the witness, and ordered that she "answer questions propounded to her relative to the said issues joined in said cause." This proceeding is designed to test the validity of that ruling and order.

The attorneys for petitioner have made no argument, but content themselves with suggesting a few points for the consideration of this court. The questions raised by the suggestions of counsel require an examination of the following sections of the Code: "Sec. 3647. But when the matter sought to be elicited would tend to render him criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as provided in the next section. Sec. 3648. A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent, except the record thereof." "Sec. 4074. Any person who knowingly, being a party to any conveyance or assignment of any estate or interest in lands, * * * or being a party to any charge on such estate, * * * made or created with intent to defraud prior or subsequent purchasers, or to hinder, delay, or defraud creditors or other persons, and every person who, being privy to or knowing of such fraudulent conveyance, assignment, or charge, puts the same in use as having been made in good faith, shall be fined not exceeding one thousand dollars, and imprisoned in the county jail not exceeding one year."

1. It is the duty of the court to determine whether a witness should answer a question propounded, but, if reasonable grounds for believing that the answer would tend to render him criminally liable exist, it should not be required. But the witness cannot claim his privilege on this ground where prosecution for the offense of which he is guilty is barred by the statute. 1 Greenl. Ev. § 451; 2 Phil. Ev. 933, 934; 1 Whart. Ev. §§ 536, 538; 2 Tayl. Ev. § 1457; Calhoun v. Thompson, 56 Ala. 166.

In this case, the witness is a party defendant called to testify for the plaintiff. She had filed her answer, in which she had denied all allegations of fraud, and the law presumes, in the absence of proof, that there was no fraud in the transactions. The witness objected to answering, on the ground of her privilege, but it does not appear that she understands what answers would tend to render her criminally liable. The date of the

execution and delivery of the deeds is not shown. It may be that prosecution for the crime, if any, involved in their execution and acceptance, is barred by the statute of limitations. Again, their execution and delivery may have involved a constructive fraud, sufficient to render them invalid as against creditors, but not of such a character as to render the grantee criminally liable. There is nothing in the record, as submitted to us, which overcomes the presumption that, so far as the witness is concerned, the transaction in question involved no criminal liability on her part. She should not be permitted to defeat the ends of justice by claiming a privilege to which there is no reasonable grounds for believing her entitled.

2. In case the witness has been guilty of a crime within the meaning of section 4074 of the Code, prosecution for which is now barred by the statute, would she be privileged from testifying as to her share in the transactions in controversy, on the ground that her answers would tend to expose her to public ignominy? "Ignominy" is defined to be "public disgrace, infamy, reproach, dishonor." Bouv. As used in our statute, it seems to have a wider meaning than the word "infamy," as formerly used to test the competency of witnesses; but, in our opinion, it was not intended to apply to all acts which might justify public censure or disapproval, but those of a more serious nature, which would tend

to expose the perpetrator to public hatred or detestation or dishonor. For example, a woman cannot be compelled to testify to sexual intercourse with different men. *Brown v. Kingsley*, 38 Iowa, 221; *Lohman v. People*, 1 N. Y. 385. Treason, felony, and offenses founded in fraud, were considered infamous at common law, and persons guilty of any of them were incompetent to testify. 1 Greenl. Ev. § 373. Under our statute, no rule applicable to all cases is possible, but the privilege of the witness must depend largely upon the facts of the transaction which are sought to be shown. It is possible that the circumstances involved in the giving and taking of the deeds in controversy were of such a character as to entitle the witness to the privilege which she claims, but there is nothing in the record to indicate that such is the case. The order of the court of which the witness complains must be understood as requiring her to answer the particular question set out in the record, and such other questions as may be proper. We cannot say that the question shown was improper, nor that the witness should not be further interrogated as to the issues involved in the case. The witness will be entitled to show reasonable grounds for believing that her answer to the question in controversy would tend to render her criminally liable, or expose her to public ignominy. With this modification the order of the district court is affirmed.

COUNSELMAN v. HITCHCOCK, Marshal.

(12 Sup. Ct. 195, 142 U. S. 547.)

Supreme Court of the United States. Jan. 11, 1892.

Appeal from the circuit court of the United States for the northern district of Illinois.

Petition by Charles Counselman for a writ of *habeas corpus* to release him from the custody of United States Marshal Frank Hitchcock, by whom he was held under an order made in certain contempt proceedings. The circuit court dismissed the petition, and remanded the prisoner. Petitioner appeals. Reversed.

John N. Jewett and *Jas. C. Carter*, for appellant. *Atty. Gen. Miller* and *G. M. Lambertson*, for appellee.

Mr. Justice BLATCHFORD delivered the opinion of the court.

On the 21st of November, 1890, while the grand jury in attendance upon the district court of the United States for the northern district of Illinois was engaged in investigating and inquiring into certain alleged violations, in that district, of an act of congress entitled "An act to regulate commerce," approved February 4, 1887, c. 104, (24 St. 379,) and the amendments thereto, approved March 2, 1889, c. 382, (25 St. 855,) by the officers and agents of the Chicago, Rock Island & Pacific Railway Company, and by the officers and agents of the Chicago, St. Paul & Kansas City Railway Company, and by the officers and agents of the Chicago, Burlington & Quincy Railroad Company, and the officers and agents of various other railroad companies having lines of road in that district, one Charles Counselman appeared before the grand jury, in response to a subpoena served upon him, and, after having been duly sworn, testified as follows:

"Question. Your name is Charles Counselman? Answer. Yes, sir. Q. You are the sole member of Charles Counselman & Co.? A. Yes, sir. Q. Engaged in the grain and commission business in the city of Chicago? A. Yes, sir. Q. Have you been a receiver of grain from the west during the past two years? A. Yes, sir. Q. Over what roads did you ship grain received by you during the present summer of 1890? A. The Rock Island & Burlington, principally. Q. From what states was most of the grain shipped? A. From Kansas and Nebraska, I think. Q. What did your receipts in bushels amount to of corn in the months of May, June, and July, 1890? A. I have no idea; I could not tell you. Q. Five hundred thousand bushels a month? A. I cannot tell you. Q. How many men have you employed during the last year? What is the usual number of men employed in connection with your business? A. I have, I think, six or seven men in my office. Q. Have you during the past year, Mr. Counselman, obtained a rate for the transportation of your grain on any of the railroads coming to Chicago, from points outside of this state, less than the tariff or open rate? A. That I decline to answer, Mr. Milchrist, on the ground that it might tend to

criminate me. Q. During the past year have you received rates upon the Chicago, Rock Island & Pacific from points outside of the state to the city of Chicago, at less than the tariff rates? A. That I decline to answer on the same ground. Q. I will ask you the same question with reference to the Burlington. A. I answer in the same way. Q. The same with reference to Atchison. A. I can't recollect that we have done any business with that road. Q. I will ask you whether you have during the last year received a rate less than the tariff rate on what is called the 'Diagonal' or Stickney road. A. Not to my knowledge. Q. Who attends to the freight department of your business? A. Myself and Mr. Martin. Q. Have you or the firm of Charles Counselman & Co. received any rebate, drawback, or commission from the Chicago, Rock Island & Pacific Railroad Company, or the Chicago, Burlington & Quincy Railroad Company, on the transportation of grain from points in the states of Nebraska and Kansas, to the city of Chicago, in the state of Illinois, during the past year, whereby you secured the transportation of said grain at less than the tariff rates established by said railroad? A. I decline to answer on the same ground."

The grand jurors thereupon filed in said court, on the 22d of November, 1890, their report, signed by their foreman and clerk, certifying to the court the several questions which Counselman so refused to answer. Thereupon the judge of the court granted a rule on Counselman to show cause why he should not answer the said questions, a hearing was had, and the court made an order, on the 25th of November, 1890, which found that the excuses and reasons advanced on behalf of Counselman, as to why he should not answer said questions, were wholly insufficient, and directed that he appear before the grand jury without delay, and there answer the said questions, and also such further questions touching the matter under inquiry by the grand jury, and which should be pertinent to such inquiry, as should be propounded to him by any member of the grand jury, or the district attorney, or any of his assistants.

Counselman was again called before the grand jury, and the same questions, together with other kindred questions, were submitted to him to answer; and he refused to answer them, and each of them, for the same reasons. The grand jury, by its report signed by its foreman and clerk, reported to the court that Counselman still refused to answer the questions which he had previously refused to answer, and upon the same grounds, and that there were also propounded to him by the district attorney and the grand jury additional questions, which, and the answers thereto, were as follows:

"Question. Do you know whether or not the Chicago, Rock Island & Pacific Railroad Company transported for any person, company, or corporation in the city of Chicago, during the year last past, grain from any point in the states of Nebraska, Kansas, or Iowa, to the city of Chicago, in the state of Illinois, for less

than the established rates in force on such road at the time of such transportation? Answer. I decline to answer, on the ground that my answer might tend to criminate me. Q. Do you know any person, corporation, or company who has obtained their transportation of grain from points or places in the states of Iowa, Nebraska, or Kansas, to the city of Chicago, over the Chicago, Rock Island & Pacific Railroad, during the past year, at a rate and price less than the published and legal tariff rate at the time of such shipment? A. I decline to answer, for the reason that my answer might tend to criminate me. Q. Do you know whether the Chicago, Rock Island & Pacific Railroad Company, within the past year, has charged, demanded, or received from any person, company, or corporation in the city of Chicago any less rate than the open rate, or rate established by said railroad company, on grain or other property transported by the said railroad company from points in the states of Nebraska, Kansas, and Iowa to the city of Chicago, in the state of Illinois? If you have such knowledge, give the name of such shipper of whom said rate was charged, demanded, or received, and the amount of such rate and shipments, stating fully all the particulars within your knowledge. A. I decline to answer, for the reason that my answer might tend to criminate me. Q. Do you know whether the Chicago, Rock Island & Pacific Railroad Company, during the year A. D. 1890, has paid to any shipper, at the city of Chicago, any rebate, refund, or commission on property and grain transported by such company from points in the states of Kansas, Nebraska, or Iowa, whereby such shipper obtained the transportation of such grain or property from the said points in said states to the city of Chicago, in the state of Illinois, at a less rate than the open or tariff rate, or the rate established by said company? If you have such knowledge, state the amount of such rebates, the drawbacks, or commissions paid, to whom paid, the date of the same, and on what shipments, and state fully all the particulars within your knowledge relating to such transaction or transactions. A. I decline to answer, for the reason that my answer might tend to criminate me."

Thereupon, after a hearing, the court on November 25, 1890, adjudged Counselman to be in contempt of court, and made an order fining him \$500 and the costs of the proceeding, and directing the marshal to take him into custody and hold him until he should have answered said questions, and all questions of similar import which should be propounded to him by the grand jury, or the district attorney, or any assistant district attorney, in the presence of such jury, and until he should pay such fine and costs. Under that order he was taken into custody by the marshal and held.

On the 26th of November, 1890, he filed in the circuit court of the United States for the northern district of Illinois a petition setting forth the foregoing facts, and praying for a writ of *habeas corpus*. The petition alleged that the grand jury had

no jurisdiction or authority to make the investigation in question, or to submit to him the several questions referred to; that his answers to those questions would tend to incriminate him, and, by compelling him to answer them, he would be compelled to be a witness against himself in the criminal proceeding and investigation pending before the grand jury, and in any criminal proceedings which might be brought as a result of such investigation, contrary to the provisions of the constitution of the United States, and especially the fourth and fifth amendments thereof; that the district court had no jurisdiction to compel him to answer said questions; that its order to that effect was contrary to the constitution and laws of the United States, and was void; that the district court had no jurisdiction so to adjudge him in contempt; that the order imposing a fine upon him and committing him to the custody of the marshal was void; and that he was held in custody without legal right, and contrary to the constitution and laws of the United States.

On the same day, the circuit court issued a writ of *habeas corpus*, returnable forthwith, the return to which by the marshal was that Counselman was held under the order of the district court, made November 25, 1890. The case was heard on November 28th, and on December 18th the circuit court, held by Judge GRESHAM, delivered an opinion, (44 Fed. Rep. 268,) and made an order adjudging that the district court was in the exercise of its rightful authority in doing what it had done, overruling the motion of Counselman for his discharge, dismissing his petition, remanding him to the custody of the marshal, discharging the writ of *habeas corpus*, and adjudging against Counselman the costs of the proceedings. He excepted to the order and appealed to this court, and an order was made admitting him to bail pending the appeal.

In the opinion of the circuit court, it was held that, under the fifth amendment to the constitution, which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself," a person cannot be compelled to disclose facts before a court or grand jury which might subject him to a criminal prosecution, or his property to forfeiture; that, under the interstate commerce law, it is made a criminal offense, punishable by fine and imprisonment, for any officer or agent of a railroad company to grant any shippers of merchandise from one state to another, and for any such shipper to contract for or receive, a rate less than the tariff or open rate; that shippers, as well as the officers, agents, and employees of corporations engaged in the carrying business between states, are made subject to the penalties of the statute; but that, as the protection of section 860 of the Revised Statutes was co-extensive with that of the constitution, Counselman was entitled to no privilege under the constitution; that, if thereafter he were to be prosecuted for the offense, section 860 would not permit his admissions to be proved against him; that his refusal to testify was not a refusal to testify in a

proceeding to obtain evidence upon which he might be indicted, but in a proceeding to obtain evidence upon which others might be indicted; and that, although in his testimony he might disclose facts and circumstances which would open up sources of information to the government, whereby it might obtain evidence not otherwise obtainable to secure his conviction, yet, if his testimony could not be repeated in any subsequent proceeding against him or his property, he was protected as fully by section 860 as the constitution intended he should be.

Section 860 is a re-enactment of section 1 of the act of February 25, 1868, c. 13, (15 St. 37,) which provided as follows: "That no answer or other pleading of any party, and no discovery or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture, by reason of any act or omission of such party or witness: provided, that nothing in this act shall be construed to exempt any party or witness from prosecution and punishment for perjury committed by him in discovering or testifying as aforesaid."

Section 860 provides as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

By section 10 of the interstate commerce act of February 4, 1887, c. 104, (24 St. 382,) as amended by section 2 of the act of March 2, 1889, c. 382, (25 St. 857,) unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, is made subject, not only to a fine of not to exceed \$5,000 for each offense, but to imprisonment in the penitentiary for not over two years, or to both, in the discretion of the court. By section 12 of the act of 1887, (24 St. 383,) as amended by section 3 of the act of 1889, (25 St. 858,) the interstate commerce commission is authorized and required to execute and enforce the provisions of the act, and, on the request of the commission, it is made the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court, and to prosecute under the direction of the attorney general of the United States, all necessary proceedings for the enforcement of the provisions of the act and for the punishment of all violations thereof.

It is contended by the appellant that the grand jury of the district court was

not in the exercise of its proper and legitimate authority in prosecuting the investigations specifically set out in its two reports to the district court; that those reports could not be made the foundation of any judicial action by the court; that the interstate commerce commission was specially invested by the statute with the authority to investigate violations of the act and charged with that duty; and that no duty in that respect was imposed upon the grand jury, until specific charges had been made.

But, in the view we take of this case, we do not find it necessary to intimate any opinion as to that question in any of its branches, or as to the question whether the reports of the grand jury, in stating that they were engaged in investigating and inquiring into "certain alleged violations" of the acts of 1887 and 1889 by the officers and agents of three specified railway and railroad companies, and the officers and agents of various other railroad companies having lines of road in the district, (there being no other showing in the record as to what they were investigating and inquiring into,) are or are not consistent with the fact that they were investigating specific charges against particular persons; because we are of opinion that upon another ground the judgment of the court below must be reversed.

It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but such is not the language of the constitution. Its provision is that no person shall be compelled in any criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the interstate commerce act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was therefore a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully, (as he was bound to do if he should answer them at all,) the answers might show that he had committed a crime against the interstate commerce act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case.

It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had

committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

It is argued for the appellee that the investigation before the grand jury was not a criminal case, but was solely for the purpose of finding out whether a crime had been committed, or whether any one should be accused of an offense, there being no accuser and no parties plaintiff or defendant, and that a case could arise only when an indictment should be returned. In support of this view reference is made to article 6 of the amendments to the constitution of the United States, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, to be confronted with the witnesses against him, to have compulsory process for witnesses, and the assistance of counsel for his defense.

But this provision distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury. A criminal prosecution under article 6 of the amendments is much narrower than a "criminal case," under article 5 of the amendments. It is entirely consistent with the language of article 5 that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.

We cannot yield our assent to the view taken on this subject by the court of appeals of New York in *People v. Kelly*, 24 N. Y. 74, 84. The provision of the constitution of New York of 1846 (article 1, § 6) was that no person shall "be compelled, in any criminal case, to be a witness against himself." The court, speaking by Judge DENO, said: "The term 'criminal case,' used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offense. But it must be a prosecution against him; for what is forbidden is that he should be compelled to be a witness against himself." This ruling, which has been followed in some other cases, seems to us, as applied to the provision in the fifth amendment to the constitution of the United States, to take away entirely its true meaning and its value.

It is an ancient principle of the law of evidence that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, or forfeitures. *Rex v. Slaney*, 5 Car. & P. 213; *Cates v. Hardacre*, 3 Taunt. 424; *Maloney v. Bartley*, 3 Camp. 210; 1 Starkie, Ev. 71, 191; *Case of Sir John Friend*, 13 How. St. Tr. 16; *Case of Earl of Macclesfield*, 16 How. St. Tr. 767; 1 Greenl. Ev. § 451; 1 Burr's Tr. 244; Whart. Crim. Ev. (9th Ed.) § 463; *Southard v. Rexford*, 6 Cow. 254; *People v. Mather*, 4 Wend. 229; *Lister v. Boker*, 6 Blackf. 439.

The relations of Counselman to the subject of inquiry before the grand jury, as shown by the questions put to him, in connection with the provisions of the interstate commerce act, entitled him to invoke the protection of the constitution.

State v. Nowell, 58 N. H. 314; *Emery's Case*, 107 Mass. 172.

It remains to consider whether section 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. It follows that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence nor used against him or his property in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

The constitutional provision distinctly declares that a person shall not "be compelled in any criminal case to be a witness against himself," and the protection of section 860 is not co-extensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the constitution. It would be quite another thing if the constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of congress cannot amend the constitution, even if it should ingraft thereon such a proviso.

In some states, where there is a like constitutional provision, it has been attempted by legislation to remove the constitutional provision, by declaring that there shall be no future criminal prosecution against the witness, thus making it impossible for the criminal charge against him ever to come under the cognizance of any court, or at least enabling him to plead the statute in absolute bar of such prosecution.

A review of the subject in adjudged cases will be useful.

In *Com. v. Gibbs*, 3 Yeates, 429, and 4 Dall. 253, in 1802, the declaration of rights in the constitution of Pennsylvania of 1776 declared that no man can "be compelled to give evidence against himself," and the same language was found in the constitution of 1790. Under this, the supreme court

of Pennsylvania held that the maxim that no one is bound to accuse himself extended to cases where the answer might involve him in shame or reproach; and it held to the same effect in *Lessee of Galbreath v. Eichelberger*, 3 Yeates, 515, in 1803.

In June, 1807, Chief Justice MARSHALL, in the circuit court of the United States for the district of Virginia, in Burr's trial, (1 Burr's Tr. 244,) on the question whether the witness was privileged not to accuse himself, said: "If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say, upon his oath, that his answer would criminate himself, the court can demand no other testimony of the fact. * * * According to their statement, [the counsel for the United States,] a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be insufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact, of itself, might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed or is attainable against any individual the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

In 1853, in *State v. Quarles*, 13 Ark. 307, the declaration of rights in the constitution of Arkansas of 1836 (article 2, § 11) had declared that, in prosecutions by indictment or presentment, the accused "shall not be compelled to give evidence against himself." Quarles was indicted under a gaming law, for betting money on a game of chance. A *nolle prosequi* having been entered as to one Neal, against whom a like prosecution was pending, Neal was sworn as a witness for the state, and informed of the *nolle prosequi*, and that no indictment for a similar offense would be preferred against him, and was asked whether he had seen Quarles bet money at cards within a specified time. Neal refused to answer the question, alleging that he feared that he would criminate himself thereby. The trial court refused to compel

him to answer, and, the jury having found for the defendant, the state appealed. There was a statute of Arkansas which read as follows: "In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense." Eng. Dig. 398, § 72.

The supreme court of Arkansas held that, although witnesses were not expressed in the terms of the provisions of the bill of rights, yet they were substantially embraced to the full extent of a complete guaranty against self-accusation; and that the privilege of the bill of rights was that a witness should not be compelled to produce the evidence to prove himself guilty of the crime about which he might be called to testify. But it was further held that, by the statute, the legislature had so changed the rule by directing that the testimony required to be given should never be used against a witness for the purpose of procuring his conviction for the crime or misdemeanor to which it related, that it was no longer necessary for him to claim his privilege in regard to such testimony, in order to prevent its afterwards being used against him; and that the only question was whether the statutory regulation afforded sufficient protection to the witness, responsive to the new rule and to the constitutional guaranty against compulsory self-accusation. It was held that the statute sufficiently guarded witnesses from self-accusation, within the meaning of the constitution, to make it lawful for the courts to compel them to testify as to all matters embraced by the provisions of the statute on that subject.

In *Higdon v. Heard*, 14 Ga. 255, in 1853, it was said that the constitution of Georgia declared that "no person shall be compelled in any criminal case to be a witness against himself." In that case the plaintiff had filed a bill in equity praying a discovery as to property which he alleged the defendants had won from him in a game of cards. The bill was demurred to on the ground that the law of the state compelling a discovery of gaming transactions was unconstitutional, because such transactions were criminal, and the statute did not grant an absolute and unconditional release from punishment, and because the defendants could not make the discovery sought without criminating themselves and incurring penalties. The demurrer was overruled by the supreme court of Georgia, on the ground that, although all persons were protected by the constitution from furnishing evidence against themselves which might tend to subject them to a criminal prosecution, they received their protection by virtue of an act of Georgia of 1764, because, under that act, their answers could not be read in evidence against them in any criminal case whatever, being excluded by the constitution.

In *Ex parte Rowe*, 7 Cal. 184, in 1857, the constitution of California of 1849 provided

(article 1, § 8) that no person shall "be compelled, in any criminal case, to be a witness against himself." Rowe had been committed for refusing to answer, under an order of the court, certain questions propounded to him by the grand jury in an examination concerning the disposition of certain moneys taken from the state treasury, on the ground that his answer would disgrace him, and would tend to subject him to a prosecution for felony. The supreme court of California, on *habeas corpus*, considered the construction and constitutionality of the fifth section of an act passed April 16, 1855, which provided that "the testimony given by such witness shall in no instance be used against himself in any criminal prosecution." The court held that the provision of the constitution was intended to protect the witness from being compelled to testify against himself in regard to a criminal offense; that he could not be a witness against himself unless his testimony could be used against him in his own case; and that the statute gave the witness that protection which was contemplated by the constitution, and therefore he was bound to answer.

✓ In 1860, in *Wilkins v. Malone*, 14 Ind. 153, the constitution of Indiana of 1851, in its bill of rights, (article 1, § 14,) had declared that "no person in any criminal prosecution shall be compelled to testify against himself." In a suit brought by Malone to recover on a promissory note, the defense pleaded usury, and offered to examine Malone as a witness to prove the usury. The plaintiff objected, on the ground that such examination would criminate himself, and the objection was sustained. On appeal to the supreme court of Indiana by the defendants, it was held that the constitutional provision protected a person from a compulsory disclosure, in a civil suit, of facts tending to criminate him, whenever his answer could be given in evidence against him in a subsequent criminal prosecution. The court referred to *State v. Quarles*, supra, and *Higdon v. Heard*, supra, and to the statute of Indiana, (1 Rev. St. p. 345, § 8,) which provided that a person charged with taking illegal interest might be required to answer, but that his answer should not be used against him in any criminal prosecution for usury. The court held that by this statute the constitutional privilege of the party was fully secured to him, although he might disclose circumstances which might lead to a criminal prosecution.

✓ In 1861, in the court of appeals of New York, (*People v. Kelly*, 24 N. Y. 74,) the constitution of New York of 1846 declared that no person shall "be compelled, in any criminal case, to be a witness against himself." In that case, one Hackley, as a witness before the grand jury on a complaint against certain aldermen for feloniously receiving a gift of money under an agreement that their votes should be influenced thereby in a matter then pending before them in their official capacity, in answer to a question put to him as to what he had done with certain money which he had received, said that any an-

swer which he could give to the question would disgrace him, and would have a tendency to accuse him of a crime, and he demurred to the question. Having been ordered by the court of general sessions of the peace to answer it, he still refused, and was adjudged guilty of contempt, and put in prison. On a writ of *habeas corpus*, he was remanded into custody by the supreme court, and he appealed to the court of appeals.

By chapter 539 of the Laws of New York of 1853 it was enacted, by section 2, that section 14 should be added to article 2, tit. 4, c. 1, pt. 4, Rev. St. The act provided that the giving of money to any member of the common council of a city, with intent to influence his action upon any matter which might be brought before him in his official capacity, should be an offense punishable by fine or imprisonment in a state-prison or both; and section 14 provided that every person offending against the statute should "be a competent witness against any other person so offending," and might be compelled to give evidence before any magistrate or grand jury, or in any court, in the same manner as other persons, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying." A similar provision was contained in chapter 446 of the Laws of 1857, in section 52.

The court of appeals considered the question whether those provisions were consistent with the true sense of the declaration of the constitution, and said, speaking by Judge DENIO, (page 82:) "The mandate that an accused person should not be compelled to give evidence against himself would fail to secure the whole object intended, if a prosecutor might call an accomplice or confederate in a criminal offense, and afterwards use the evidence he might give to procure a conviction, on the trial of an indictment against him. If obliged to testify, on the trial of the co-offender, to matters which would show his own complicity, it might be said upon a very liberal construction of the language that he was compelled to give evidence against himself,—that is, to give evidence which might be used in a criminal case against himself. * * * It is, of course, competent for the legislature to change any doctrine of the common law, but I think they could not compel a witness to testify, on the trial of another person, to facts which would prove himself guilty of a crime, without indemnifying him against the consequences, because I think, as has been mentioned, that by a legal construction the constitution would be found to forbid it." But the court went on to say: "If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent, or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition, and not any want of humanity in the law. If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission,

on his own trial, would tend to prove him guilty of a criminal offense. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision. The term 'criminal case,' used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offense. But it must be a prosecution against him; for what is forbidden is that he should be compelled to be a witness against himself. Now, if he be prosecuted criminally, touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It cannot, therefore, be said that in such criminal case he has been made a witness against himself, by force of any compulsion used towards him, to procure, in the other case, testimony which cannot possibly be used in the criminal case against himself." The court held, therefore, that Hackley was not protected by the constitution of New York from answering before the grand jury.

In 1871, in *Emery's Case*, 107 Mass. 172, article 12 of the declaration of rights in the constitution of Massachusetts of 1780 had declared that no subject shall be "compelled to accuse or furnish evidence against himself." A statute of Massachusetts, of March 8, 1871, c. 91, entitled "An act for the better discovery of testimony and the protection of witnesses before the joint special committee on the state police," provided as follows: "No person who is called as a witness before the joint special committee on the state police shall be excused from answering any question or from the production of any paper relating to any corrupt practice or improper conduct of the state police, forming the subject of inquiry by such committee, on the ground that the answer to such question or the production of such paper may criminate or tend to criminate himself, or to disgrace him, or otherwise render him infamous, or on the ground of privilege; but the testimony of any witness examined before said committee upon the subject aforesaid, or any statement made or paper produced by him upon such an examination, shall not be used as evidence against such witness in any civil or criminal proceeding in any court of justice; provided, however, that no official paper or record, produced by such witness on such examination, shall be held or taken to be included within the privilege of said evidence so to protect such witness in any civil or criminal proceeding as aforesaid, and that nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid."

Emery was summoned as a witness before the joint special committee of the senate and house of representatives of the general court "to inquire if the state police is guilty of bribery and corruption." Inter-

rogatories were propounded to him by the committee, which he declined to answer. On a report of the facts to the senate, it ordered his arrest for contempt. He was brought before the senate, and asked the following question: "Are you ready and willing to answer before the joint special committee, appointed by this senate and the house of representatives of Massachusetts, to inquire if the state police is guilty of bribery and corruption, the following questions, namely: *First*. Whether, since the appointment of the state constabulary force, you have ever been prosecuted for the sale or keeping for sale intoxicating liquors. *Second*. Have you ever paid any money to any state constable, and do you know of any corrupt practice or improper conduct of the state police? If so, state fully what sums, and to whom you have thus paid money, and also what you know of such corrupt practice and improper conduct." He answered in writing as follows: "Intending no disrespect to the honorable senate, I answer, under advice of counsel, that I am ready and willing to answer the first question; but I decline to answer the second question, upon the grounds—*First*, that the answer thereto will accuse me of an indictable offense; *second*, that the answer thereto will furnish evidence against me by which I can be convicted of such an offense." The senate thereupon committed him to the custody of the sergeant at arms, to be confined in jail for 25 days, or until the further order of the senate, unless he should sooner answer the questions. He was imprisoned accordingly, and the case was brought before Judge WELLS of the supreme judicial court on a writ of *habeas corpus*, and was fully argued. It was held under advisement and for conference with the other judges; and in the opinion subsequently delivered by Judge WELLS it is stated that that opinion had the approval and unanimous concurrence of all the members of the court. It is said in the opinion, in regard to the second question put to the witness: "It is apparent that an affirmative answer to the question put to him might tend to show that he had been guilty of an offense, either against the laws relating to the keeping and sale of intoxicating liquors, or under the statute for punishing one who shall corruptly attempt to influence an executive officer by the gift or offer of a bribe. Gen. St. c. 163, § 7."

In regard to the clause above quoted from the bill of rights, the opinion says: "By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner, although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of

being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending, or that might be brought against him therefor, such disclosure would be an accusation of himself, within the meaning of the constitutional provision. In the absence of regulation by statute, the protection against such self-accusation is secured by according to the guilty person, when called upon to answer as witness or otherwise, the privilege of then avowing the liability and claiming the exemption, instead of compelling him to answer, and then excluding his admissions so obtained, when afterwards offered in evidence against him. This branch of the constitutional exemption corresponds with the common-law maxim, *nemo tenetur seipsum accusare*, the interpretation and application of which has always been in accordance with what has been just stated. Broom, Leg. Max. (5th Ed.) 968; Wing. Max. 486; Rosc. Crim. Ev. (2d Amer. Ed.) 159; Starkie, Ev. (8th Amer. Ed.) 41, 204, and notes; 1 Greenl. Ev. § 451, and notes." The opinion then cites the case of *People v. Kelly*, supra, as holding that the clause in the constitution of New York of 1846 protected a witness from being compelled to answer to matters which might tend to criminate himself, when called to testify against another party; and also *People v. Mather*, 4 Wend. 229, as declaring that the exemption in the constitution of New York extended to the disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt might be established, although that fact alone would not indicate any crime. The opinion then proceeds: "The third branch of the provision in the constitution of Massachusetts, 'or furnish evidence against himself,' must be equally extensive in its application; and, in its interpretation, may be presumed to be intended to add something to the significance of that which precedes. Aside from this consideration, and upon the language of the proposition standing by itself, it is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the *corpus delicti* itself. Both the reason upon which the rule is founded, and the terms in which it is expressed, forbid that it should be limited to confessions of guilt, or statements which may be proved in subsequent prosecutions, as admissions of facts sought to be established therein." The court then proceeds to hold that those constitutional provisions applied to investigations before a legislative body.

Passing, then, to consider the effect of the statute of 1871, the opinion says: "It follows from the considerations already named that so far as this statute requires a witness, who may be called, to answer questions and produce papers which may tend to criminate himself, and attempts to take from him the constitutional privilege in respect thereto, it must be entirely ineffectual for that purpose, unless it also relieves him from all liabilities, for protection against which the privilege is secured to him by the constitution. The statute does undertake to secure him against certain of those liabilities, to-wit, the use of any disclosures he may make, as admissions or direct evidence against him, in any civil or criminal proceeding." The opinion then refers to the case of *People v. Kelly*, supra, and says that that decision was made upon the ground that the terms of the provision of the constitution of New York protected the witness only from being compelled "to be a witness against himself," and did not protect him from the indirect and incidental consequences of a disclosure which he might be called upon to make.

The opinion then says: "The terms of the provision in the constitution of Massachusetts require a much broader interpretation, as has already been indicated; and no one can be required to forego an appeal to its protection, unless first secured from future liability, and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the privilege accorded by the constitution. Under the interpretation already given, this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate. It is not done, in direct terms, by the statute in question; it is not contended that the statute is capable of an interpretation which will give it that effect; and it is clear that it cannot and was not intended to so operate. Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the constitution, or to remove the whole liability against which its provisions were intended to protect them, it fails to deprive them of the right to appeal to the privilege therein. The result is that, in appealing to his privilege, as an exemption from the obligation to answer the inquiries put to him, the petitioner was in the exercise of his constitutional right; and his refusal to answer upon that ground was not, and could not be considered as, disorderly conduct, or a contempt of the authority of the body before which he was called to answer. There being no legal ground to authorize the commitment upon which he is held, he must be discharged therefrom."

Accord
In *Cullen v. Com.*, 24 Grat. 624, in 1873, Cullen, when asked before a grand jury to state what he knew of a certain duel, declined to answer, because the answer would tend to criminate him. The hustings court ordered him to answer, and, on his still refusing to do so, fined him

and committed him to jail. The case was brought before the court of appeals of Virginia. The bill of rights of the constitution of Virginia of 1870, in section 10 of article 1, provided that no man can "be compelled to give evidence against himself." That provision had existed in the bill of rights of Virginia as far back as June 12, 1776, and of it the court of appeals said that it was the purpose of its framers "to declare, as part of the organic law, that no man should anywhere, before any tribunal, in any proceeding, be compelled to give evidence tending to criminate himself, either in that or any other proceeding;" and that the provision could not be confined "only to cases in which a man is called on to give evidence himself in a prosecution pending against him."

The opinion then cited *People v. Kelly* and *Emery's Case*, hereinbefore referred to, as sustaining its view, and proceeded to consider the effect of an act of Virginia, passed October 31, 1870, in regard to dueling, which provided as follows: "Every person who may have been the bearer of such challenge or acceptance, or otherwise engaged or concerned in any duel, may be required, in any prosecution against any person but himself, for having fought or aided or abetted in such duel, to testify as a witness in such prosecution; but any statement made by such person, as such witness, shall not be used against him in any prosecution against himself." The court held that the effect of the statute was to invade the constitutional right of the citizen, and to deprive the witness of his constitutional right to refuse to give evidence tending to criminate himself, without indemnity, and that the act was therefore, to that extent, unconstitutional and void. It held further that, before the constitutional privilege could be taken away by the legislature, there must be absolute indemnity provided; that nothing short of complete amnesty to the witness, an absolute wiping out of the offense as to him, so that he could no longer be prosecuted for it, would furnish that indemnity; that the statute in question did not furnish it, but only provided that the statement made by the witness should not be used against him in a prosecution against himself; that, without using one word of that statement, the attorney for the commonwealth might in many cases, and in a case like that in hand inevitably would, be led by the testimony of the witness to means and sources of information which might result in criminating the witness himself; and that this would be to deprive the witness of his privilege, without indemnity. The judgment of the hustings court was reversed.

In *State v. Nowell*, 58 N. H. 314, in 1878, article 15 of the bill of rights in the constitution of New Hampshire of 1792 declared that no subject shall "be compelled to accuse or furnish evidence against himself." Nowell refused to testify before a grand jury as to whether, as a clerk for one Goodwin, he had sold spirituous liquors, and whether Goodwin sold them or kept them for sale. He declined to answer on the ground that his evidence might

tend to criminate himself. A statute of the state (Gen. St. c. 99, § 20) provided as follows: "No clerk, servant, or agent of any person accused of a violation of this chapter shall be excused from testifying against his principal, for the reason that he may thereby criminate himself; but no testimony so given by him shall, in any prosecution, be used as evidence, either directly or indirectly, against him, nor shall he be thereafter prosecuted for any offense so disclosed by him." A motion having been made, before the supreme court of New Hampshire, for an attachment against him for contempt for refusing to testify, that court, after quoting the provision in the bill of rights, said: "The common-law maxim (thus affirmed by the bill of rights) that no one shall be compelled to testify to his own criminality has been understood to mean, not only that the subject shall not be compelled to disclose his guilt upon a trial of a criminal proceeding against himself, but also that he shall not be required to disclose, on the trial of issues between others, facts that can be used against him as admissions tending to prove his guilt of any crime or offense of which he may then or afterwards be charged, or the sources from which, or the means by which, evidence of its commission or of his connection with it may be obtained. *Emery's Case*, 107 Mass. 172, 181."

In regard to the statute, the court said that the legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which he is compelled to disclose; that he was to be secured against all liability to future prosecution as effectually as if he were wholly innocent; that this would not be accomplished if he were left liable to prosecution criminally for any matter in respect to which he might be required to testify; that the statute of New Hampshire went further than the statute of Massachusetts considered in *Emery's Case*, because it provided that the witness should not be thereafter prosecuted for any offense so disclosed by him; that the witness had, under the statute, all the protection which the common-law right, adopted by the bill of rights in its common-law sense, gave him; that, if he should be prosecuted, a plea that he had disclosed the same offense on a lawful accusation against his principal would be a perfect answer in bar or abatement of the prosecution against himself; and that, unless he should testify, the motion for the attachment must be granted.

In 1880, in *La Fontaine v. Southern Underwriters*, 83 N. C. 132, the constitution of North Carolina of 1876 had provided, in the declaration of rights, (article 1, § 11,) that, "in all criminal prosecutions every man has the right * * * to * * * not be compelled to give evidence against himself." One Blacknall, as a witness in a hearing before a referee in a civil suit, had refused to answer a question as to his possession of certain books, on the ground that indictments were pending against him, connected with the

management of the affairs of the association owning the books, and that his answer to the question might tend to criminate him. The case was heard before an inferior state court, which ruled that he must answer the question. On appeal to the supreme court of North Carolina, it held that the fair interpretation of the constitutional provision was to secure a person who was or might be accused of crime from making any compulsory revelations which might be used in evidence against him on his trial for the offense; that, as the witness was protected from the consequences of the discovery, and the facts elicited could be given in evidence in no criminal prosecution to which they were pertinent, the plaintiff in the case was entitled to all the information which the witness possessed, whether it did or did not implicate the witness in a fraudulent transaction; that the inquiry could not be evaded upon any ground of the self-criminating answer which might follow, although the answers of the witness could not be used against him in any criminal proceeding whatever; and that his constitutional right not to "be compelled to give evidence against himself" would be maintained intact and full.

In *Temple v. Com.*, 75 Va. 892, in 1881, the same section 10 of article 1 of the bill of rights of the constitution of Virginia of 1870, that was considered in *Cullen v. Com.*, supra, was in force. An indictment had been found by a grand jury, on the evidence of Temple, against one Berry for setting up a lottery. On the trial of Berry before the petit jury, Temple refused to testify, on the ground that by so doing he would criminate himself; and for such refusal he was fined and imprisoned for contempt by the hustings court. The case was taken to the court of appeals by writ of error. That court cited with approval *Cullen's Case*, supra, and held that it was applicable. It appeared that in the hustings court the attorney for the commonwealth was asked whether any prosecution was pending against Temple in that court, or whether it was the intention of such attorney to institute a proceeding against Temple for being concerned in a lottery, to both of which questions he replied in the negative.

The court of appeals held that Temple had a right to stand upon his constitutional privilege, and not to trust to the chances of a further prosecution; that the court could offer him no indemnity that he would not be further prosecuted, nor could the attorney for the commonwealth; that Temple had a right to remain silent whenever any question was asked him, the answer to which might tend to criminate himself; that the great weight of authority in the United States was in favor of the rule that, when a witness on oath declared his belief that his answer would tend to criminate himself, the court could not compel him to answer, unless it was perfectly clear, from a careful consideration of all the circumstances in the case, that the witness was mistaken, and that the answer could not possibly have such a tendency; and that the hustings court had no right to compel Tem-

ple to answer the question propounded to him, and to fine and imprison him for his refusal to answer it. The court further held that the statute of the state which provided that no witness giving evidence in a prosecution for unlawful gaming should ever be proceeded against for any offense of unlawful gaming committed by him at the time and place indicated in such prosecution did not apply to the case then in hand, because setting up a lottery was not within the statute against unlawful gaming. The judgment of the hustings court was reversed.

In *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, in 1886, this court, in considering the fifth amendment to the constitution of the United States, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and the fourth amendment, which declares that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, said, speaking by Mr. Justice BRADLEY, (page 631, 116 U. S., and page 533, 6 Sup. Ct. Rep.): "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." It was further said, (page 633, 116 U. S., and page 534, 6 Sup. Ct. Rep.): "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. * * * As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against

himself, within the meaning of the fifth amendment to the constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—with in the meaning of the fourth amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

In that case, the fifth section of the act of June 22, 1874, (18 St. 187,) which authorized the court in revenue cases to require the defendant or claimant to produce his private papers in court, or else the allegations of the government's attorney would be taken as confessed, was held to be unconstitutional and void, as applied to a suit for a penalty or to establish a forfeiture of the goods of the party, because it was repugnant to the fourth and fifth amendments to the constitution; and it was held that a proceeding to forfeit the goods was a criminal case, within the meaning of the fifth amendment. Mr. Justice MILLER, in the concurring opinion of himself and Chief Justice WAITE in the case, agreed that it was a criminal one, within the meaning of the fifth amendment, and that the effect of the act of congress was to compel the party on whom the order of the court was served to be a witness against himself.

In *People v. Sharp*, 107 N. Y. 427, 14 N. E. Rep. 319, in 1887, the court of appeals of New York had under consideration the provision of article 1, § 6, of the constitution of New York of 1846, that no person shall "be compelled, in any criminal case, to be a witness against himself," and the provision of section 79 of the Penal Code of New York, tit. 8, c. 1, in regard to bribery and corruption, which was in these words: "A person offending against any provision of any foregoing section of this Code relating to bribery is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or investigation, in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment, prosecution, or punishment for that bribery, and may plead or prove the giving of testimony

accordingly, in bar of such an indictment or prosecution." Sharp and others were indicted for bribing a member of the common council, and Sharp was tried separately. It was proved that he had been examined as a witness before a committee of the state senate, and there gave testimony which the prosecution claimed was evidence of his complicity in the crime; and that testimony was offered in evidence by the prosecution. The testimony had been given under the compulsion of a subpoena, and was admitted at the trial, against the objection that the disclosures before the senate committee were privileged. The court of appeals held that section 79 of the Penal Code made the constitutional privilege inapplicable, because it indemnified or protected the party against the consequences of his previous testimony. The court cited with approval the case of *People v. Kelly*, supra.

In *Bedgood v. State*, 115 Ind. 275, 17 N. E. Rep. 621, in 1888, the supreme court of Indiana had under consideration the provision of article 1, § 14, of the bill of rights of the constitution of Indiana of 1851, which provides that "no person in any criminal prosecution shall be compelled to testify against himself," and the provision of section 1800 of the Revised Statutes of Indiana of 1881, to the effect that testimony given by a witness should not be used in any prosecution against him. On a trial before a petit jury in a criminal case against others, a woman had refused to answer a question, on the ground that the answer might criminate her. The supreme court held that, as the statute prohibited her testimony from being used against her, it completely protected her, and the judgment was reversed because the trial court had erroneously refused to require her to answer the question.

This review of the cases above referred to shows that in the constitutions of Georgia, California, and New York the provision is identically or substantially that of the constitution of the United States, namely, that no person shall "be compelled in any criminal case to be a witness against himself;" while in the constitutions of Pennsylvania, Arkansas, Indiana, Massachusetts, Virginia, New Hampshire, and North Carolina it is different in language, and to the effect that "no man can be compelled to give evidence against himself;" or that, in prosecutions, the accused "shall not be compelled to give evidence against himself;" or that "no person in any criminal prosecution shall be compelled to testify against himself;" or that no person shall be "compelled to accuse or furnish evidence against himself;" or that no man can "be compelled to give evidence against himself;" or that, in all criminal prosecutions, "every man has the right to not be compelled to give evidence against himself."

Under the constitutions of Arkansas, Georgia, California, Indiana, New York, New Hampshire, and North Carolina it was held that a given statutory provision made it lawful to compel a witness to testify; while in Massachusetts and Virginia it was held that the statutory provisions were inadequate, in view of the constitu-

tional provision. In New Hampshire, and in New York under the Penal Code, it was held that the statutory provisions were sufficient to supply the place of the constitutional provision, because, by statute, the witness was entirely relieved from prosecution.

But, as the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation; and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject shall not be "compelled to accuse or furnish evidence against himself," such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States and of New York, which declare that no person shall be "compelled in any criminal case to be a witness against himself." Under the rulings above referred to by Chief Justice MARSHALL and by this court, and those in Massachusetts, New Hampshire, and Virginia, the judgment of the circuit court in the present case cannot be sustained. It is a reasonable construction, we think, of the constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him." *Emery's Case*, 107 Mass. 172, 182.

It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. It is to be noted of section 860 of the Revised Statutes that it does not undertake to compel self-criminating evidence from a party or a witness. In several of the state statutes above referred to the testimony of the party or witness is made compulsory, and in some either all possibility of a future prosecution of the party or witness is distinctly taken away, or he can plead in bar or abatement the fact that he was compelled to testify.

We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect, we give our assent rather to the doctrine of *Emery's Case*, in Massachusetts, than to that of *People v. Kelly*, in New York; and we consider that the ruling of this court in *Boyd v. U. S.*, supra, supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.

It is contended on the part of the appellee that the reason why the courts in Virginia, Massachusetts, and New Hampshire have held that the exonerating statute must be so broad as to give the witness complete amnesty is that the constitutions of those states give to the witness a broader privilege and exemption than is granted by the constitution of the United States, in that their language is that the witness shall not be compelled to accuse himself, or furnish evidence against himself, or give evidence against himself; and it is contended that the terms of the constitution of the United States, and of the constitutions of Georgia, California, and New York, are more restricted. But we are of opinion that, however this difference may have been commented on in some of the decisions, there is really, in spirit and principle, no distinction arising out of such difference of language.

From a consideration of the language of the constitutional provision and of all the authorities referred to, we are clearly of opinion that the appellant was entitled to refuse, as he did, to answer. The judgment of the circuit court must therefore be reversed, and the case remanded to that court, with a direction to discharge the appellant from custody on the writ of *habeas corpus*.

STATE v. PETERS.

(12 S. E. 74, 107 N. C. 876.)

Supreme Court of North Carolina. Nov. 6, 1890.

Indictment for perjury, tried before Womack, J., and a jury, at May term, 1890, of Guilford superior court. The indictment was as follows: "The jurors for the state upon their oath present that George Peters, of Guilford county, did unlawfully commit perjury upon the trial of an action in the mayor's court of the city of Greensboro, before James W. Forbes, mayor, in Guilford county, wherein the state was plaintiff and Amos Phillips was defendant, by falsely asserting on oath that he (meaning the said George Peters) had not purchased any spirituous liquors from Amos Phillips less than half a pint on Sunday, April 27, 1890, knowing the said statement to be false, or being ignorant whether or not said statement was true, against the form of the statute in such case made and provided, and against the peace and dignity of the state." The false swearing was alleged to have taken place before the mayor of Greensboro, in the trial of Amos Phillips upon the following warrant, which was introduced in evidence: "State and City of Greensboro against Amos Phillips, before James W. Forbes, mayor. Warrant for retailing. State of North Carolina to the Chief of Police of the City of Greensboro, or other lawful officer of Guilford County,—Greeting: Whereas, complaint has been made before me this day, on the oath of W. J. Weatherly, that Amos Phillips, on or about the 28th day of April, 1890, with force and arms, at and in the county aforesaid, and within the city limits, did willfully and unlawfully sell spirituous liquors inside the corporation to one George Peters, in quantity less than five gallons, without having license, against the statute in such cases made and provided, against the peace and dignity of the state, and in violation of the city ordinance, (section 8, c. 15, p. 110:) These are therefore to command you forthwith to apprehend the said Amos Phillips, and him have before me at the mayor's office, then and there to answer the said charge, and be dealt with according to law. Given under my hand and seal this 7th day of May, A. D. 1890. JAS. W. FORBES, Mayor. [Seal.]" The evidence is substantially stated in the opinion. The jury returned a verdict of guilty. Motion in arrest of judgment, on the ground that the indictment was not sufficient in its averments to charge the crime of perjury. Motion denied. Sentence pronounced as in the record from which defendant appealed.

The Attorney General, for the State.
John W. Graham, for defendant.

CLARK, J., (after stating the facts as above.) The defendant's counsel asked a witness, "Was not the warrant on which Amos Phillips was tried issued without a sworn complaint or affidavit being made by any person whatever?" The indictment charged the perjury to have been committed in that trial. The question was ruled out on objection by the state, and defendant excepted.

In State v. Bryson, 84 N. C. 780, ASHE, J., in construing the act which is now Code, § 1133, says that no written affidavit or complaint is essential, and that the appellate court "can only look at the warrant which is the complaint," and "cannot look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence." If the objection now made could not have availed Phillips on appeal *a fortiori*, it could not be raised in this collateral way by the defendant. In England, where a written information on oath, it seems, is necessary to the validity of a warrant, it was held by a full bench in the court of criminal appeals in a recent case—(Reg. v. Hughes, 14 Cox, Crim. Cas. 284 (1879))—that on an indictment for perjury, alleged to have been committed by a witness in a case where the warrant was issued without either written information or any oath whatever, this irregularity could not avail the witness in such case when on trial for perjury committed in such action any more than whether the court in such case pronounced a legal or illegal judgment. Those are matters which concerned the defendant in that case, but not the witness if the court had jurisdiction of the offense charged in the warrant. In State v. Lavalley, 9 Mo. 834, the court says that it is no defense for a person charged with perjury to show that the court committed error in its proceeding, provided it had jurisdiction of the subject-matter and of the parties, and that any other rule would change the issue, so that, instead of trying the defendant for false swearing, the court would review the regularity and correctness of the proceeding in another case. In State v. Alexander, 4 Hawks, 182, the court upon the face of the warrant had no jurisdiction of the action in which the false oath was taken. The jurisdiction depends not upon the affidavit preliminary to issuing the warrant, but on the nature of the offense charged in the warrant. The defendant asked the court to instruct the jury "that, as the evidence of Weatherly and others did not establish the fact that the liquid which Phillips had was spirituous, and that as their evidence, with the other circumstances taken together, only afforded an inference that it was spirituous liquor, it was not sufficient to convict of an indictment for perjury," and further "that no witness corroborated the evidence of Weatherly as to the sale by Phillips to the defendant, nor was there any confirmatory circumstances as to the sale itself from Phillips to defendant, and that it amounted only in either of above cases to the oath of Weatherly against the oath of Peters, the defendant, and that such was not sufficient to warrant a conviction for perjury." The court did not give these instructions, and defendant excepted. A witness for the state testified that on the Saturday night before the Sunday (April 27, 1890) on which the illegal sale of spirituous liquor by Phillips was charged to have been committed, he saw Phillips get a jug of white liquid drawn from a barrel in a bar-room, and pay for it, and take it and place it near where he afterwards saw him in the alley, on the north side of the street, on the Sun-

day referred to, on which day he saw Phillips go to where it had been placed several times, and return with a bottle, from which he poured out the drinks in a small glass, holding much less than half a pint, to divers colored men, who drank and handed Phillips money, and he saw Peters in the crowd. Another witness, one Weatherly, testified that the liquid looked like corn whisky; that Phillips poured it out of a bottle into a "short" glass holding much less than half a pint; that he saw the defendant, Peters, drink, and give Phillips a nickel, and that divers other colored men came to Phillips at the same place, in the alley on the north side of the street, in the course of some hours. A third witness testified to the crowd of colored men coming to Phillips, who was on the north side of the street, into the alley, described by the other witnesses, and that the defendant, Peters, was among them. The witness heard money rattling out in the alley, but did not look to see who had it, and did not see any transaction between Phillips and Peters. There was also evidence by the mayor and another witness that on the trial of Amos Phillips, the defendant, Peters, was sworn and examined as a witness, and testified that he did not buy any liquor in quantity less than half a pint from Amos Phillips on the day testified to by the state's witnesses, and that he was not on the north side of the street on that Sunday. The false oath charged in the indictment is that the defendant testified at the trial of Amos Phillips that "he had not purchased any spirituous liquor from Amos Phillips less than half a pint on Sunday, April 27, 1890." The materiality of the oath, and that the defendant so swore, are not controverted by any exception taken. We think there was sufficient evidence to go to the jury upon the question whether the liquid dispensed on that occasion by Amos Phillips was spirituous liquor. One witness testified that he saw defendant purchase of Amos Phillips some of the liquid in quantity less than half a pint on Sunday, April 27, 1890, and pay for it. The testimony of other witnesses of sales by Amos Phillips of the liquid at the same time and place to divers others, and of defendant being in the crowd, and on the north side of the street, together with defendant's denial before the mayor that he was on that day north of the street, together with all the circumstances in evidence, make evidence corroborative of the single witness who testified as eye-witness of the sale by Phillips to Peters. *State v. Brown*, 79 N. C. 642. It is not required that "the corroborative circumstances should equal in weight the testimony of one witness, but there must be enough, in addition to the testimony of one witness, to turn the scale as against the weight of the prisoner's oath on the former trial." 2 Bish. Crim. Proc. § 871. The instructions asked were properly refused.

The defendant moved in arrest of judgment, on the ground that "the bill of indictment was not sufficient in its averments to charge the crime of perjury." The bill of indictment is a substantial copy of the form authorized by chapter 83, Acts

1889, except that it adds the formal conclusion, "against the form of the statute, in such case made and provided, and against the peace and dignity of the state." These words are not required by the act cited, nor are they necessary or material in an indictment for any offense in this state, as was held by the court in *State v. Kirkman*, 104 N. C. 911, 10 S. E. Rep. 312. The same rule obtains in England. The House of Lords, in the famous perjury case of *Castro v. Queen*, (better known as the *Tichborne Case*,) L. R. 6 App. Cas. 229, held, Lord Chancellor SELBORNE and Lords BLACKBURN and WATSON concurring in the opinion, affirming the court below, that by virtue of St. 14 & 15 Vict. (similar to our Code, § 1183) the words "against the form of the statute and against the peace and dignity of the queen" were not essential in any indictment, and their omission not ground either for a motion to quash or in arrest of judgment. But we take it that their use is mere surplusage. The defendant contends however that the indictment is defective in that no time is laid. The act does not require it, and indeed, as time is not of the essence of the offense, "the omitting to state the time at which it was committed" is not ground to stay or reverse the judgment. Code, § 1189.

It is urged here that the warrant in the case against Amos Phillips was entitled, "State and City of Greensboro vs. Amos Phillips," and that it charged that the offense was against the ordinance of the city of Greensboro, when the illegal sale of spirituous liquor is an offense only cognizable by state authority. No objection was taken below to the introduction of the warrant, nor was there any prayer for instruction that there was a variance between the allegation and proof. If we could notice such objection, when taken here for the first time, it is sufficient to say that the warrant in proper terms charges a sale of spirituous liquor, without license, and as an offense against the state. The additional averment in the warrant that it was a violation of a town ordinance also was mere surplusage as was the use of the words, "and City of Greensboro," in entitling the warrant. *State v. Collins*, 85 N. C. 511; *State v. Brown*, 79 N. C. 642.

Objection was also taken here that on the face of the record the mayor had no jurisdiction of the offense charged against Phillips, and therefore the defendant could not be convicted of false swearing, the action being *coram non jure*. By virtue of Code, § 3818, the mayor is a court, with the jurisdiction of a magistrate, and as such he had authority to investigate the charge of selling liquor without license. It does not appear whether he assumed final jurisdiction or merely bound the party over to court, or acquitted the defendant or dismissed the action. Nor is it material, since the subsequent erroneous or illegal judgment of the mayor could not affect the guilt or innocence of this defendant. The charge in the warrant determines the jurisdiction, and not what is done in the trial.

It is further objected that the allegation of the false oath as having been taken at the "trial of an action," etc., is not sufficient-

ly definite. Still it is such allegation as is declared sufficient by the statute, and we cannot see that it can make any difference whether it was a "preliminary trial" or a trial with final jurisdiction. Either comes within Code, § 1092. The many technicalities which have hampered the administration of justice in regard to false swearing moved the legislature to enact section 1185 of the Code, and more recently the above-cited act prescribing a simple form of indictment for that offense. Chapter 83, Acts 1889. The authority of the legislature to prescribe forms of indictment is sustained in *State v. Moore*, 104 N. C. 743, 10 S. E. Rep. 183. The form of indictment here authorized points out to the defendant that the offense charged is perjury, the court and the names of the parties to the proceeding in which it is alleged to have been committed, the words alleged to have been sworn, and their falsity. The charge is simplified. But the constituent elements of the offense remain as before. They are included in the allegation, "did commit perjury," and it must still

be shown in proof that the defendant made oath or affirmation substantially as charged that the defendant was duly sworn by an officer competent to administer the oath, and in a matter of which he had jurisdiction, and in one of the instances specified in Code, § 1092,—i. e., "in a suit, controversy, matter, or cause depending in any of the courts of the state, or in a deposition or affidavit taken pursuant to law, or in an oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed;" that it was in a material matter, and the jury must be further satisfied that such oath or affirmation was willfully and corruptly false. When, however, falsity is proven, it has been held that the burden is on the defendant to show that it arose from surprise, inadvertence, or mistake, and not from a corrupt motive. *State v. Chamberlin*, 30 Vt. 559; 2 Whart. Crim. Law, (9th Ed.) § 1320.

PER CURIAM. No error.

DEIMEL et al. v. BROWN et al.

(27 N. E. 44, 136 Ill. 586.)

Supreme Court of Illinois. March 30, 1891.

Appeal from appellate court, first district.

Moses, Newman & Pam, for appellants.
Tenney, Hawley & Coffeen, E. C. Crawford,
and Cratty Bros. & Ashcraft, for appellees.

BAKER, J. In September, 1884, Jacob Biersdorf, of 362 Canal street, Chicago, failed in business. Thereafter Brown, De Furck & Co. recovered in the superior court of Cook county two judgments against him for the aggregate amount of \$7,291.64, besides costs; and Bean, Hughes & Co. recovered judgment against him in the same court for \$410.87, besides costs; and William A. Comstock recovered judgment against him in the county court of said county for \$499.13, besides costs; and Hammacher, Schlemmer & Co. recovered judgment against him in said superior court for \$1,285.34 and costs. Brown, De Furck & Co. and Bean, Hughes & Co. joined in a creditors' bill, which was exhibited in said superior court, and William A. Comstock and Hammacher, Schlemmer & Co. filed intervening petitions. Jacob Biersdorf, Mrs. Jacob Biersdorf, the Sugg & Biersdorf Furniture Manufacturing Company, and the present appellants, Simon, Joseph, and Rudolph Deimel, composing the firm of Deimel & Bros., were made parties to the original and amended bills, and the intervening petitions. Subsequently the complainants in the bills and the intervening petitioners dismissed their suits as against Mrs. Jacob Biersdorf and the Sugg & Biersdorf Company. Answers and replications were filed, and the cause was heard upon the pleadings and proofs, and the court found the material allegations of the amended bill and the intervening petitions to be true, and entered a decree rendering judgments against Simon Deimel, Joseph Deimel, and Rudolph Deimel, and in favor of Brown, De Furck & Co., for \$8,820.47; in favor of Bean, Hughes & Co. for \$504.13; in favor of William A. Comstock for \$608.42; and in favor of Hammacher, Schlemmer & Co. for \$1,437.19; and awarding executions for said several and respective amounts, and for costs. Appeals were taken by the Deimels from these several decrees in favor of different judgment creditors of Biersdorf, and by consent of parties the appeals were heard both in the appellate court and in this court as one appeal. There was a judgment of affirmance in the appellate court.

The theory of the amended bill and of the intervening petitions is that in February, 1884, Biersdorf, the principal defendant, sold and delivered to the co-defendants, Simon, Joseph, and Rudolph Deimel, composing the firm of Deimel & Bros., 209 pieces of Tingue plushes, at \$1.65 per yard, and of the aggregate value of \$14,700; and that said \$14,700 remains unpaid and owing from the co-defendants to Biersdorf; and that they, for the purpose of keeping said money out of the reach of the creditors of Biersdorf, falsely claim and pretend that the purchase price of said Tingue plushes has been paid and discharged, but that in fact the claimed payment was

fictitious and colorable merely, and a part of a scheme to defraud the creditors of Biersdorf, and that since said money still remains unpaid, it ought to be applied in satisfaction of the judgments of the several appellees against Biersdorf. The principal defendant and the co-defendants were called upon to answer under oath. The answer of Biersdorf states that for nearly three years prior to his failure he was, and since has been, confined to his bed by sickness, and thereby compelled to leave the management of his business in the hands of one Max Berg, "and therefore has little or no knowledge of the condition or character of said accounts or other matters connected with said business or its assets." It further states that he has neither possession nor control nor knowledge of his books of account. It admits that Rudolph Deimel, Joseph Deimel, and Simon Deimel had numerous business transactions with him in the way of purchasing goods of him, but denies that at the time of the filing of the bill of complaint a large part or any part of the purchase price of said goods remained unpaid, or that the Deimels were then or are owing him on account of said purchases \$15,000 or any other sum. The substance of the joint and several answers of Simon, Joseph, and Rudolph Deimel is as follows: That some time in the month of February, 1884, they bought a large quantity of plush from Jacob Biersdorf, amounting in all to about 209 pieces. The plush was received in the month of February, 1884, and was what is known in the commercial world as "Tingue" plush, and was of the value of about \$14,700. The plush was paid for in the following manner: On the 29th day of January, 1884, Jacob Biersdorf had purchased from the defendants lumber and merchandise to the amount of \$12,787, and on February 7, 1884, to the amount of about \$5,502.50, and afterwards became indebted to them upon other transactions in the sum of about \$1,000, and that said accounts were adjudged and set off against each other, and the difference paid these defendants in cash or notes, which were afterwards paid by Biersdorf; that said settlement was made in September, 1884, and that at that time Biersdorf was indebted to the defendants in the sum of \$19,000. They further answered that they were not, nor are either of them, in any wise or to any extent indebted to Jacob Biersdorf, nor were they so indebted at the time of the filing of the original bill in said cause, and that they did not then have or have they now in their possession, custody, or control any property of any kind or nature belonging to Jacob Biersdorf, or in which he has or had any interest, claim, or demand whatsoever, and that they hold no such property in trust for him, either directly or indirectly. The matter to charge appellants—the purchase by them in February, 1884, from Biersdorf of a lot of Tingue plushes for \$14,700—is claimed in the bill and petitions and admitted in the answer. The rule is that where a fact is alleged in a bill and admitted by the answer, such admission is conclusive of the existence of the fact, and other evidence to establish such fact is unnecessary. *Insurance Co. v. Myer*, 93 Ill. 271; *Morgan v. Corlies*, 81 Ill. 72. The

matter in discharge of appellants, as stated in their answer, is that on January 29, 1884, Biersdorf bought of them "lumber and merchandise" to the amount of \$12,787, and on February 7, 1884, to the amount of \$5,502.50, and afterwards became indebted to them in the further sum of about \$1,000, and that in September, 1884, a settlement was made between them, and the accounts set off against each other, and the difference paid by Biersdorf to them. It is admitted that these statements are responsive to the charges and interrogatories contained in the bill and petitions, but appellees deny the truth of such statements. The material issue in the case, then, is whether or not appellants paid and settled for the \$14,700 worth of plushes, as is represented by them in their sworn answer.

What weight have the sworn answers as evidence for appellants? The general rule is that, where an answer to a bill in chancery is required to be made under oath, and an answer is filed which is responsive to the allegations of the bill, then all material averments of the bill that are denied by such answer must be proved by the testimony of two witnesses, or by evidence which is equal to the testimony of two witnesses. This rule, however, has no application to averments denied upon information and belief, or where the defendant himself refutes the sworn statements in his answer. It is only when a defendant states facts within his own personal knowledge that his answer has to be overcome by evidence equivalent to the testimony of two witnesses. *Fryrear v. Lawrence*, 5 Gilman, 325. In the case cited this court said: "While a defendant's answer, which is required to be sworn to, is made evidence in the cause by the complainant, it is only entitled to weight when it is entitled to belief; and if he chooses to swear to that which the court sees he cannot, or which he admits he does not know, he is entitled to no more credit, and is subject to the same censure and condemnation as any other reckless witness, who the court sees is trying to impose upon it his belief, when he should only speak of his knowledge. The court is not a mere machine to weigh everything that is offered without examining its value, any more when the defendant's oath is put into the scale than when examining the testimony of any other witness." The answer of the defendant Biersdorf states that in September, 1884, and for nearly three years prior thereto, he was, and for the greater part of the time since then has been, confined to his bed by sickness, and was compelled to leave the management of his business to one Max Berg, "and therefore has little or no knowledge of the condition or character of said accounts or other matters connected with said business or its assets." This admission thoroughly impeaches his answer as evidence, and renders his denial contained therein of any indebtedness from Deimel & Brothers to him of no probative force whatever. It is manifest that at the most such denial is based upon mere information and belief.

The joint and several answer of the appellants is sworn to by all three of them. The statements in said answer are made in positive and unqualified terms. But

there is in evidence in the cause the record in a garnishment suit prosecuted in the circuit court of Cook county in the name of Biersdorf for the use of Marshall Field & Co. against said Deimel & Bros.; and it appears therefrom that in said suit it was sought to reach by garnishment the same fund that is here involved, and that the written interrogatories there filed covered the same transactions and facts that are embraced in the answer now under consideration. It further appears from said record that, while all three of the appellants joined in the answers made in said garnishee proceeding, yet that the truth of such answers was sworn to by Joseph Deimel alone; that said Joseph there made affidavit that he was the only member of the firm who is personally familiar with all the matters and things referred to in the several interrogatories; and that said Rudolph and Simon Deimel also made affidavit that they are not personally familiar with all the matters referred to in the 3d, 4th, 5th, 6th, and 7th interrogatories asked of them as garnishees, and are unwilling to swear to the answers filed to the same; and that, as to the matters referred to in said interrogatories, they were business transactions in the special charge of their copartner, Joseph Deimel, who is personally familiar with the same. The purchase of the \$14,700 worth of Tingué plushes, and the supposed settlement therefor, all transpired during the year 1884. If in November, 1885, they had no such personal knowledge of the transactions relating thereto as would authorize them to make oath in respect thereto, it is impossible that in March, 1886, said matters were within their own knowledge. We think that the fact that Rudolph and Simon Deimel have sworn to the answer gives it no weight as evidence in favor of appellants.

Joseph Deimel also made oath to the answer. This made it competent evidence for the firm, and imposed upon appellees the burden of overcoming it, so far as it states matters in discharge of appellants, by evidence equivalent to that of two witnesses. Did the superior court err in its findings that this has been done? In the answers sworn to by him in the Marshall Field & Co. garnishee proceedings, Joseph Deimel gave an account of the purchase by Deimel & Bros. in the month of February, 1884, of the lot of Tingué plushes here involved; and also stated that Biersdorf was indebted to Deimel & Bros., in February, 1884, and prior to the time of purchasing said plushes, in a sum considerably in excess of the amount or price of said plushes, and the same was applied in payment of said indebtedness of Biersdorf to Deimel & Bros. so far as the purchase price of said plushes would extend in payment thereof; and to these answers added this: "All the foregoing matters appear upon the books of said R. Deimel & Bros." The deposition of Joseph Deimel was taken at the instance of appellees. We have read this deposition at length, as it appears in the record itself, and it impresses our minds as being evasive and disingenuous. In respect to almost all of the material questions asked him by appellees he shields himself behind the plea that he does not remember. When questioned in regard to

the details of the dealings of his firm with Biersdorf, he answers, time and time again, and almost uniformly, that he does not remember; that he can tell nothing in reference to the particular matter inquired about without his books; that his ledger would show the transactions, that his books would show the transactions; that his ledger was in New York, and most of the other books destroyed by fire. An analysis of his testimony would require more time and space than the reasonable limits of an opinion would allow; but suffice it to say that it is manifest therefrom that he has but little knowledge or recollection in respect to the dealings with Biersdorf, and that most of that was predicated upon what appeared upon the ledger and other books of his firm. He even states in his examination that he does not remember that he ever read the answer in chancery which is here under consideration, but that, if he signed it, he supposes that he read it. Upon the whole, his deposition has not favorably impressed us; and, in our opinion, it goes far to impeach the force of his sworn answer. Hereafterwards, in obedience to a subpoena, produced the ledger before the master in chancery; and it was then desired by appellee "to examine him with reference to the items contained in the ledger, which he here produces, and which in his former examination he claimed his inability to testify about on account of the absence of the books;" but both he and his counsel refused to submit to such examination. The account of Biersdorf, as it appears upon the ledger produced by Deimel & Bros., is as follows:

1883.		1884.	
Aug. 30.	6 off cash, 1—1883.....	Sept. 14.	By cash, 244.....
1881.	Reg. 1—557.....	Aug. 20.	By bills rec. 100.....
Jan'y 29.	1—571.....	do	" " 651.....
Feb'y 7.	58.....	By cash, 61.....	18,299 53
Aug. 20.	20 00		\$19,419 53
	\$19,419 53		
Oct. 22.	To cash, do	Dec. 31.	By indsc., 104.....
Nov. 22*	71.....		\$1,110 00
	\$150 00		\$1,110 00
	651 00		
	\$1,110 00		\$1,110 00

The items which appellees claim to be false and fraudulent are the charges "1884. Jan'y 29. Reg. 1-557, \$12,787.00," and "1884. Feb'y 7. 1-571, \$5,502.50," and the credit, "Sept. 11. By cash, 61, \$18,289.53." It is supposed that the order-book and impression or bill book of the firm would throw light upon the above items of charge; but they were not produced by appellants. It is stated by Joseph Deimel in his deposition that most of the books, other than the ledger, were lost by fire; but in this he is contradicted by Taylor, who was book-keeper, and by Drown, who was assistant book-keeper, of the firm, and the substance of their evidence is that the books were preserved in the vault, and that they did not know of any books having been lost or destroyed by the fires. It appears from the testimony of Taylor, which is corroborated by that of Drown, and by that of Jenkins, an employe of a firm of book-binders and printers, that he (Taylor) in 1885, by direction of Joseph Deimel, removed some 80 leaves from the order book of Deimel & Co., which included a large part of the year 1884, and covered the transactions with Biersdorf, and caused to be ruled and paged and bound in the book an equal number of blank pages of like paper, and on which were written up orders for goods, including fictitious orders of goods for Biersdorf; and at the same time pages containing copies of pages of bills to purchasers of goods were removed from the bill-book, covering a part of 1884, and blank leaves corresponding to those removed were inserted therein, and the book rebound; and that bills were entered therein to correspond with the orders entered in the mutilated order-book; and that a solution of coffee was used to give the substituted leaves the appearance of age. This evidence is wholly uncontradicted; and its truth was further made manifest by the production in court by Taylor, under an order of court, of the leaves which had been removed from the order-book. Upon page 29 of the loose sheets produced by Taylor appears a supposed Biersdorf order, as follows:

- "J. D." January 28.
4749, Jacob Biersdorf, 362 Canal St., City.
4758 50 pieces Olive, 1 U. I. Tingle plush, embossed Franklin.
50 " Gold 0, Tingle plush, embossed Franklin.
25 " Blue 4, Tingle plush, embossed Franklin, \$1.55 per yard.
25 " Green 2, Tingle plush, embossed Franklin.
50 " Red 2, Tingle plush, embossed Franklin.

Terms, net 60 days, to be delivered Jan'y 29th, or 5 p. off 10 days. J.

It appears from the testimony of Taylor that in the order-book as altered, lumber was substituted for plushes, and that the same change was made in the bill-book. The charge in ledger, January 29, \$12,787, is based on the order of January 28th, and corresponding entry in bill-book. He also states that the items which constitute the charge of \$5,502.50 were changed in the order-book and in the bill-book. These mutilations of their books are admitted by appellants; but it is claimed in their behalf

that the object in view was not to defraud the creditors of Biersdorf, but to defraud Marshall Field & Co. in a suit for damages brought in New York by Deimel & Bros. against said Marshall Field & Co. for breach of a contract to deliver in the month of February, 1884, a large quantity of Tingue plushes. It is suggested that, if the charges against Biersdorf for \$12,787 and \$5,502.50 were just charges, it is immaterial to said creditors whether they were predicated upon items for plushes sold or items for lumber sold. It is readily perceived how it might have been for the interest of appellants, in said damage suit, to show that in order to supply the demands of their business they had been compelled to go into the market and buy from Biersdorf \$14,700 worth of Tingue plushes at \$1.65 a yard; and so also it might have been for their benefit in said suit, for the purpose of enhancing damages or creating a fictitious price for such goods, to have manipulated their books to show fictitious and unreal sales of plushes by them. But here the falsification of their books is not explainable upon either of these theories. The purchase of plushes from Biersdorf was not shown by the books, either before or after the mutilation; and by the alterations charges which before that indicated sales of plushes by them were changed to sales of lumber. It is difficult to see what bearing the sale of lumber by appellants to Biersdorf would have in the litigation for the non-delivery of silk plushes to appellants by Marshall Field & Co. It is more reasonable to suppose that for some reason it was deemed unadvisable that the books should show such very large sales of plushes to Biersdorf, or that at or about the time they were buying plushes for Biersdorf at \$1.65 per yard they were also selling him many thousands of dollars worth of the same quality of plushes at \$1.55 a yard; and that the charges made were in furtherance of a plan to still further cover up the fund of \$14,700, and conceal it from the creditors of Biersdorf, said Biersdorf having failed in business some months before. That which we have above said proceeds upon the theory that the entries upon the ledger of \$12,787 and \$5,502.50 were made prior to the changes made in the books; but that such was the case is not at all clear from the evidence. Taylor, in his evidence taken before the master, says: "The entries \$12,787 and \$5,502.50 in January and February, 1884, were not made at those dates, but a considerable time afterwards, and after the mutilation of the books, and not from actual transactions occurring in Deimel's business." Subsequently, on his cross-examination, he states that the entries on the ledger were made according to the dates there shown, but that the items which constituted the charges of \$12,787 and \$5,502.50 were altered, changed in the order-book and in the bill-book, which were made over and leaves put in. It is evident from the testimony of Taylor that he was an unwilling witness for appellees, and desired to tell as little as possible that was injurious to appellants; that he was quite considerably under the influence of

Joseph Deimel; and that the latter interviewed him frequently prior to and pending his several examinations as a witness in respect to his testimony, and sought to influence him in regard to the evidence he should give. We are inclined to think that it would be conducive to a just result to take his statements most strongly against appellants. In respect to the credit, September 11th, of \$18,289.53, Taylor testifies, among other things, that it represents no real transaction of that date; that to preserve the balance cash was debited with that amount, and credited with merchandise charged to Biersdorf; that it appeared as though the amount had been paid in cash, and charged to merchandise, and to Moses L. Miller, a brother-in-law of Deimel's; and that Joseph Deimel instructed him to credit Biersdorf for cash, and charge it up to some such account, where it would not attract attention. On June 2, 1885,—about the time that the books were mutilated and changed,—Joseph Deimel telegraphed from New York to Charles L. Miller, who was his brother-in-law, and a son-in-law of Biersdorf, as follows: "Don't neglect to see Max as per my letter to Rudo. If any one should ask him anything he can say he remembers nothing, and his books are lost, but if they give him time he will try to refresh his memory. Write me if any one has been to see him. Do so to-day, as it is important. Look him up wherever he is. JOE." The reasonable presumption is that the "Max" mentioned in the telegram was Max Berg, who was a brother-in-law of Biersdorf, and the book-keeper and business manager of said Biersdorf. It is significant, when taken in connection with this telegram, that Biersdorf states in his sworn answer "that he has neither possession nor control nor knowledge of his books of account," and that, notwithstanding the efforts which the record shows were made in that behalf, said books of account were not obtained and brought into court. There is nothing whatever in the record to suggest that the charges of January 29 and February 7, 1884, were for any merchandise or consideration other than lumber or plushes. There is no evidence except that of the sworn answer tending to show that appellants sold lumber to Biersdorf. The deposition of Henry Stahl, who was foreman for Biersdorf, and the other evidence in the case, renders it reasonably certain that no lumber was so sold. The testimony of Rudolph Deimel, of C. L. Dietrich, who in 1884 was shipping clerk of Deimel & Bros., and of E. G. Markus, a teamster in the employment of the firm, tends to show the sale and delivery of plushes by appellants to Biersdorf in the early part of 1884. The statements of the first are impeached by the affidavit which he made and filed in the Marshall Field & Co. garnishment proceeding. If we should assume the matters stated by all three of them to be true, yet they are not inconsistent with the theory of appellees that shortly before the failure of Biersdorf, and in contemplation thereof, said Biersdorf, through Max Berg, purchased large quantities of plushes from his creditors, and resold them to appellants, and

with the intention of depriving such creditors of the fund realized from such plushes; that Deimel & Bros. were active participants in the contemplated fraud; and that the hauling of plushes to and fro between the places of business of Deimel & Bros. and Biersdorf was simply part and parcel of the plan to cover up and conceal the actual facts. Under all the circumstances of the case, we are unable to say that it was error in the superior court to arrive at the conclusion that the other evidence in the case was sufficient to successfully impeach and overcome the sworn answer of Joseph Deimel.

Some minor points seem to require brief attention. It is objected—citing in that behalf *Durand v. Gray*, 129 Ill. 9, 21 N. E. Rep. 610—that in respect to some of the judgment creditors it does not sufficiently appear from the pleadings and proofs that legal remedies have been exhausted, since the residence of the judgment debtor at the time of the issuance and delivery of execution is not stated. It is both averred and proven that the judgments were recovered in courts of record in Cook county, and that the executions were issued to and returned by the sheriff of that county. In the absence of averment or evidence to the contrary, the presumption is that the defendant resides in the county where the suit is brought and judgment recovered. It appears from the record that on November 25, 1885, the summons herein was served on Biersdorf in Cook county, and the presumption is that he then resided there. It abundantly appears from the evidence that in the latter part of March, 1889, said debtor was a resident of said county. The maxim *probatis extremis præsuntur media* has application to the case. The objection was not made in the court below, and it is now too late to question the jurisdiction of the court of

chancery for want of specific averments in the pleadings of some of the creditors of the place of residence of the judgment debtor at the dates when executions were sued out.

It is immaterial that the bill fails to state that the complainants were creditors when the Biersdorf transaction took place in February, 1884. This is not a bill to set aside the sale of the plushes to Deimel & Bros. as being a voluntary conveyance of property without consideration, and a fraud against claims of then existing creditors, but the case of appellees admits and recognizes the validity of the sale, and proceeds upon the theory that the indebtedness thereby created was fraudulently covered up and concealed, and that such indebtedness was a fund which really belonged to the judgment debtor. If there are assets of the debtor in the hands of appellants, they can be reached by the creditors, no matter when the debts due to the latter were contracted. The court, in its decree, found that the \$14,700 had not been paid, and that said indebtedness, with interest thereon at 6 per cent. per annum, amounted to \$17,640, and that said sum of \$17,640 constituted a fund to which the creditors had a right to resort for the collection of their claims against Biersdorf, and rendered judgments and awarded executions in favor of the several appellees, aggregating \$11,370.21. The finding that interest was due on the \$14,700 is assigned as error. A fraudulent vendee or trustee is chargeable with 6 per cent. interest on the value of the property or fund. *Steere v. Hoagland*, 50 Ill. 377. In respect to the remaining objections urged by appellants, we may say that we think them without merit, and that they do not call for special notice. The judgment of the appellate court is affirmed.

ROBINSON et al. v. UNITED STATES.

(13 Wall. 363.)

Supreme Court of the United States. Dec., 1871.

Error to the circuit court of the United States for the district of California.

Action by the United States against Robinson & Co., merchants of San Francisco, on a contract with the assistant quartermaster of the United States "to deliver" on his order "1,000,000 bushels of first quality clear barley" between the 1st of July, 1867, and the 30th of June, 1868, at such points as might be designated, and at such times and in such quantities as might be required. The contract did not provide as to whether the barley was to be delivered in sacks or in bulk. The first barley delivered was delivered in sacks, but, on being required to deliver 30,000 pounds more, defendants tendered the quantity in wagons which the officer at the post where it was tendered refused to accept, and the contractor abandoned his contract. The United States asked a witness shown to have been engaged in the grain business in California as to his knowledge of the usage of the trade in delivering barley. An objection that it was incompetent for plaintiff to vary the terms of a contract by evidence of a usage was overruled, and the witness testified that it was the custom to deliver grain in sacks, and had always been the custom. There was no other evidence of usage, and the court found that it was the usage, and always had been in California, to deliver barley in sacks, unless expressly stipulated otherwise, and that the tender in bulk was not sufficient under the contract. Judgment for the United States, and defendants bring error.

E. L. Goold, for plaintiffs in error. G. H. Williams, Atty. Gen., and B. H. Bristow, Sol. Gen., for the United States.

Mr. Justice DAVIS delivered the opinion of the court.

In *Barnard v. Kellogg*, 10 Wall. 383, this court decided that proof of a custom or usage inconsistent with a contract, and which either expressly or by necessary implication contradicts it, cannot be received in evidence to affect it; and that usage is not allowed to subvert the settled rules of law. But we stated at the same time that custom or usage was properly received to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence, and that such evidence was thus used on the

theory that the parties knew of the existence of the custom or usage and contracted in reference to it. This latter rule is as well settled as the former (1 Smith, Lead. Cas. [7th Ed.] p. 386), and under it the evidence was rightly received.

It is obvious by the steps which the defendants took to perform their contract, that there are two modes in which barley may be delivered, for they delivered part in sacks and tendered part in bulk. And it is equally obvious, on account of the additional cost, that they would not have delivered the barley in sacks for a period of six months, if the contract on its face was satisfied by a delivery in bulk. The contract, by its terms, is silent as to the mode of delivery, and although there are two modes in which this can be done, yet they are essentially different, and one or the other, and not both, must have been in the minds of the parties at the time the agreement was entered into. In the absence of an express direction on the subject, extrinsic evidence must of necessity be resorted to in order to find out which mode was adopted by the parties, and what extrinsic evidence is better to ascertain this than that of usage? If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the same place, it is but reasonable to assume that the parties contracting about it, and specifying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed. Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary.

The evidence in the present case did not tend to contradict the contract, but to define its meaning, in an important point, where, by its written terms, it was left undefined. This, it is settled, may be done.

It is objected that the usage was proved by a single witness. But we cannot assert, as a rule of law governing proof of usages of trade, that if a witness have a full knowledge and a long experience on the subject about which he speaks, and testifies explicitly to the antiquity, duration, and universality of the usage, and is uncontradicted, the usage cannot be regarded by the jury as established. On the contrary, the authorities are that in such a case it may be. See 1 Smith, Lead. Cas. (7th Ed.) 782; *Vail v. Rice*, 5 N. Y. 156; *Marston v. Bank of Mobile*, 10 Ala. 284; *Partidge v. Forsyth*, 29 Ala. 200.

Judgment affirmed.

WHISKY CASES.

(99 U. S. 594.)

UNITED STATES v. FORD (two cases).
 SAME v. ONE STILL. SAME v. FIFTY
 BARRELS OF DISTILLED SPIRITS.
 SAME v. THREE HUNDRED AND NINE-
 TEEN BARRELS OF WHISKY. SAME
 v. FOUR HUNDRED BARRELS OF DIS-
 TILLED SPIRITS. SAME v. FOUR
 HUNDRED PACKAGES OF DISTILLED
 SPIRITS. SAME v. ONE HUNDRED
 AND FIFTY BARRELS OF WHISKY.

Supreme Court of the United States. Oct.,
 1878.

Error to the circuit court of the United States for the Northern district of Illinois.

The first two of these cases were actions of debt to recover the penalties imposed by sections 3296 and 3452 of the Revised Statutes. The remaining cases were by way of information under sections 3281, 3299, 3453, and 3456. The defence in the first case, and it is substantially the same in all, consists of the general issue and the following special plea:

"And for a further plea in this behalf said defendants say *actio non*, because they say that heretofore, to wit, on the twenty-seventh day of December, A. D. 1875, at Chicago, at, to wit, said northern district of Illinois, the said plaintiffs and the said defendants entered into an agreement by which it was, among other things, agreed that if the said defendants would testify on behalf of the plaintiffs frankly and truthfully, when required, in reference to a conspiracy among certain government officials in the revenue service and other parties, then known to exist, whereby the honest manufacture of spirits and payment of the tax had been rendered practically impossible, and should plead guilty to one count in an indictment then pending against them in the district court, in and for said northern district, and should withdraw their pleas in a certain condemnation case then pending against them in said district court, the said plaintiffs would recall any and all assessments under the internal-revenue laws then made against said defendants, and that no more assessments under said law should be made against said defendants, and that no proceedings other than said condemnation case should be prosecuted against said defendants, and that no new proceedings should be commenced against said defendants on account of transactions then past; and these defendants aver that they and each of them have fully performed said contract on their part, and defendants further aver that this suit is a proceeding other than said condemnation case, and that this suit is for the recovery upon transactions prior to the entering into said agreement; and this the said defendants are ready to verify."

A demurrer to the special plea was over-

ruled, and judgment rendered for the defendants, and the judgment of the district court affirmed.

The Attorney General, for the United States. Mr. Edward Jussen and Mr. Charles H. Reed, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Accomplices in guilt, not previously convicted of an infamous crime, when separately tried are competent witnesses for or against each other; and the universal usage is that such a party, if called and examined by the public prosecutor on the trial of his associates in guilt, will not be prosecuted for the same offence, provided it appears that he acted in good faith and that he testified fully and fairly.

Where the case is not within any statute, the general rule is that if an accomplice, when examined as a witness by the public prosecutor, discloses fully and fairly the guilt of himself and his associates, he will not be prosecuted for the offence disclosed; but it is equally clear that he cannot by law plead such fact in bar of any indictment against him, nor avail himself of it upon his trial, for it is merely an equitable title to the mercy of the executive, subject to the conditions before stated, and can only come before the court by way of application to put off the trial in order to give the prisoner time to apply to the executive for that purpose. *Rex v. Rudd*, 1 Cowp. 331.

Sufficient appears to show that the following are the material proceedings in the several cases: 1. That the first two were actions of debt commenced in the circuit court to recover the double internal-revenue tax imposed, as fully set forth in the respective declarations. 2. That the other six cases are informations filed in the district court to forfeit the properties therein described for acts done in violation of the internal-revenue laws.

Service was made in the first two cases, and the defendants appeared and pleaded the general issue and the special plea set forth in the transcript. Issue was joined upon the first plea, and the United States demurred to the special plea. Hearing was had, and the court overruled the demurrer and gave judgment for the defendants. Like defences in the form of answers or pleas were filed in the other six cases commenced in the district court, to which the United States demurred; but the district court overruled the demurrers, and finally rendered judgment in each case for the defendants. Prompt steps were taken by the district attorney to remove the cases into the circuit court, where the respective judgments rendered by the district court were affirmed.

Suffice it to say in this connection, without entering into detail, that the United States

sued out a writ of error in each case and removed the same into this court. Both parties agree that the questions presented for decision are the same in each case, in which the court here fully concurs.

Two errors are assigned as causes for reversing the judgment, which present very clearly the matters in controversy as discussed at the bar. 1. That the plea or answer set up as defence is bad because it is too general and does not set forth the supposed agreement in traversable form. When filed, the first assignment of error also objected to the plea or answer that it did not designate the officer who made the alleged agreement, which was plainly a valid objection to it; but that was obviated at the argument, it being conceded by the United States that the plea or answer should be understood as alleging that the supposed agreement was made by the district attorney. 2. That the plea or answer is bad because the officer representing the government in these prosecutions had no authority to make the agreement pleaded, and that the court cannot enforce it, as it is void.

As amended, it requires no argument to show that the plea or answer cannot be understood as alleging that the president was a party to any such agreement, as the distinct allegation is that it was made by the district attorney; nor could any such implication have arisen even if the pleading had not been amended, as it is settled law that suits of the kind to recover municipal forfeitures must be prosecuted in the subordinate courts by the district attorney, and in this court, when brought here by appeal or writ of error, by the attorney general. *Confiscation Cases*, 7 Wall. 454. Suppose the plea to be amended as stipulated at the argument, the first question is, whether as amended it sets up a good defence to the several actions. Taken in that view, it alleges in substance and effect that the district attorney promised the defendants that if they would testify in behalf of the United States frankly and truthfully when required, in reference to a conspiracy among certain government officials in the internal-revenue service, and other parties then known to exist, whereby the honest manufacture of distilled spirits and the collection of the tax thereon had been rendered practically impossible, and would plead guilty to one count in an indictment then pending against them in said district court, and would withdraw their pleas in certain condemnation cases then pending against their property in said district court, for the purpose only of insuring their good faith in so testifying on behalf of the United States, then the United States would recall any and all assessments under the internal-revenue law made against them, and that no more assessments under said law should be made against them, that no more proceedings

against them should be commenced on account of violations of the internal-revenue laws then passed, and that no penalties or forfeitures should in any manner be enforced or recovered against them or their property, that all suits for penalties and for forfeitures then pending against them and their property should be dismissed, and that full and complete indemnity should be granted to them as the said claimants.

Complete performance on their part is alleged by the claimants, and they allege that the pending suits are for the condemnation and confiscation of their property, which was seized by the United States on the ground of the alleged violation of the internal-revenue law, prior to entering into the said agreement. Assessments made against the claimants or their property are to be recalled, and they and their property are to be free of internal-revenue taxation. Proceedings pending against them for violations of the internal-revenue laws are to be dismissed and no more are to be instituted, and the claimants are promised full and complete indemnity, civil and criminal, if they will consent to testify.

Considering the scope and comprehensive character of the supposed agreement, it is not strange that the district attorney deemed it proper to demur to the plea. He took two objections to it; but the court will examine the second one first, as if that is sustained, the other will become immaterial.

Waiving for the present the question whether the district attorney may contract with an accomplice of an accused person on trial, that if he will testify in the case his taxes shall be abated, or that he and his property shall be exempt from internal-revenue taxation, the court will consider in the first place whether the district attorney, as a public prosecutor, may properly enter into an agreement with such an accomplice, that if he will testify fully and fairly in such a prosecution against his associate in guilt he shall not be prosecuted for the same offence; and if so, whether such an agreement, if the witness performs on his part, will avail the witness as a defence to the criminal charge in case of a subsequent prosecution.

Considered in its full scope, the agreement is that in consideration of the defendants testifying against their co-conspirators who were indicted for defrauding the revenue, they, the defendants, should have a full and complete discharge, not only from all criminal liability, but from all penalties and forfeitures they had incurred, and from liability for their internal-revenue taxes which they had fraudulently refused to pay, giving them full and complete indemnity, civil and criminal, for all their fraudulent and illegal acts in respect to the public revenue.

Courts of justice everywhere agree that the established usage is that an accomplice duly

admitted as a witness in a criminal prosecution against his associates in guilt, if he testifies fully and fairly, will not be prosecuted for the same offence, and some of the decided cases and standard text-writers give very satisfactory explanations of the origin and scope of the usage in its ordinary application in actual practice. Beyond doubt, some of the elements of the usage had their origin in the ancient and obsolete practice called "approvement," which may be briefly explained as follows: When a person indicted of treason or felony was arraigned, he might confess the charge before plea pleaded, and appeal, or accuse another as his accomplice of the same crime, in order to obtain his pardon. Such approvement was only allowed in capital offences, and was equivalent to indictment, as the appellee was equally required to answer to the charge; and if proved guilty, the judgment of the law was against him, and the approver, so called, was entitled to his pardon *ex debito justitiæ*. On the other hand, if the appellee was acquitted, the judgment was that the approver should be condemned. 4 Bl. Comm. 359.

Speaking upon that subject, Lord Mansfield said, more than a century ago, that there were three ways in the law and practice of that country, in which an accomplice could be entitled to a pardon: First, in the case of approvement, which, as he stated, then still remained a part of the common law, though he admitted it had grown into disuse by long discontinuance. Secondly, by discovering two or more offenders, as required in the two acts of parliament to which he referred. Thirdly, persons embraced in some royal proclamation, as authorized by an act of parliament, to which he added, that in all these cases the court will bail the prisoner in order to give him an opportunity to apply for a pardon.

Approvers, as well as those who disclosed two or more accomplices in guilt and those who came within the promise of a royal proclamation, were entitled to a pardon; and the same high authority states that besides those ancient statutory regulations there was another practice in respect to accomplices who were admitted as witnesses in criminal prosecutions against their associates, which he explains as follows: Where the accomplice has made a full and fair confession of the whole truth and is admitted as a witness for the crown, the practice is, if he act fairly and openly and discover the whole truth, though he is not entitled of right to a pardon, yet the usage, the lenity, and the practice of the court is to stop the prosecution against the accomplice, the understanding being that he has an equitable title to a recommendation for the king's mercy.

Subsequent remarks of the court in that opinion showed that the ancient statutes referred to were wholly inapplicable to the

case, and that there remained even at that date only the equitable practice which gives a title to recommendation to the mercy of the crown. Explanations then follow which prove that the practice referred to was adopted in substitution for the ancient doctrine of approvement, modified and modelled so as to be received with greater favor. As modified it gives, as the court said in that case, a kind of hope to the accomplice that if he behaves fairly and discloses the whole truth, he may, by a recommendation to mercy, save himself from punishment and secure a pardon, which shows to a demonstration that the protection, if any, to be given to the accomplice rests on the described usage and his own good behavior; for if he acts in bad faith, or fails to testify fully and fairly, he may still be prosecuted as if he had never been admitted as a witness. *Rex v. Rudd*, 1 Cowp. 331, 1 Leach, 115.

Great inconvenience arose from the practice of approvement, in consequence of which a mode of proceeding was adopted in analogy to that law, by which an accomplice may be entitled to a recommendation to mercy but not to a pardon as of legal right, nor can he plead it in bar or avail himself of it on his trial. 2 Hawk. P. C. p. 532, note 3; 3 Russ. Crimes (9th Am. Ed.) 596.

In the present practice, says Mr. Starkie, where accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to a pardon, the usage, lenity, and practice of the court is to stay the prosecution against them and they have an equitable title to a recommendation to the king's mercy. 2 Starkie, Ev. (4th Am. Ed.) 15.

Participes criminis in such a case, when called and examined as witnesses for the prosecution, says Roscoe, have an equitable title to a recommendation for the royal mercy; but they cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for putting off the trial in order to give the prisoner time to present an application for the executive clemency. Roscoe, Cr. Ev. (9th Am. Ed.) 597.

Authorities of the highest character almost without number support that proposition, nor is it necessary to look beyond the decisions of this court to establish the correctness of the rule. *Ex parte Wells*, 18 How. 307.

Special reference is made in that case to the three ancient modes of practice which authorized accomplices, when admitted as witnesses in criminal prosecutions, to claim a pardon as a matter of right; and the court having explained the course of such proceedings, remarked that, except in those cases,

accomplices, though admitted to testify for the prosecution, have no absolute claim or legal right to executive clemency.

Much consideration appears to have been given to the question in that case, and the court held that the only claim the accomplice has in such a case is an equitable one for pardon, and that only upon the condition that he makes a full and fair disclosure of the guilt of himself and that of his associates, that he cannot plead it in bar of an indictment against him for the offence, nor use it in any way except to support a motion to put off the trial in order to give him time to apply for a pardon.

Three-quarters of a century before that, ten of the twelve judges of England decided in the same way, holding that the accomplice in such a case cannot set up such a claim in bar to an indictment against him, nor avail himself of it upon his trial, that such a claim for mercy depends upon the conditions before described, and that it can only come before the court by way of application to put off the trial in order to give the party time to apply for a pardon. *Rex v. Rudd*, 1 Leach, 125; 1 Chit. Cr. Law (Ed. 1847) 82; *Mass. Cr. Law*, 175.

Attempt was made sixty years later in the same court to convince the judges then presiding that some of the remarks of the chief justice in *Rex v. Rudd*, before cited, justified the conclusion that the accomplice in such a case was by law entitled to be exempted from punishment; but Lord Denman replied that the organ of the court on that occasion was not speaking of legal rights in the strict sense, nor of such rights as would constitute a defence to an indictment or an answer to the question why sentence should not be pronounced, saying, in substance and effect, that the right mentioned was only an equitable right, and that the court would postpone the trial or any action in the case to the prejudice of the prisoner, in order to give him an opportunity to apply to the crown for mercy. *Rex v. Gar-side*, 2 Adol. & E. 275; *Rex v. Lee*, Russ & R. 361; *Rex v. Hunton*, Id. 454.

Other text writers of the highest repute, besides those previously mentioned, affirm the rule that accomplices, though admitted as witnesses for the prosecution, are not of right entitled to a pardon, that they have only an equitable right to a recommendation to the executive clemency; and they all hold that prisoners under such circumstances cannot plead such right in bar of an indictment against them, nor avail themselves of it as a defence on their trial.

None of those propositions can be successfully controverted; but it is equally clear that the party, if he testifies fully and fairly, may make it the ground of a motion to put off the trial in order that he may apply to the executive for the protection which immemorial usage concedes that he is entitled to

at the hands of the executive. 3 Russ. Crimes (9th Am. Ed.) 597.

Certain ancient statutory regulations, as already remarked, gave unconditional promise to accomplices of pardon and complete exemption from punishment, and in such cases it was always held that the accomplice, if he was called and examined for the prosecution, was entitled as of right to a pardon, provided he acted in good faith, and testified fully and fairly to the whole truth. Instances of the kind are adverted to by Mr. Phillips in his valuable treatise on Evidence; but he, like the preceding text writer, states that accomplices, when admitted as witnesses, under the more modern usage and practice of the courts, have only an equitable title to be recommended to mercy, on a strict and ample performance, to the satisfaction of the presiding judge, of the conditions on which they were admitted to testify, that such an equitable title cannot be pleaded in bar nor in any manner be set up as a defence to an indictment charging them with the same offence, though it may be made the ground of a motion for putting off their trial in order to allow time for an application to the pardoning power. 1 Phil. Ev. (Ed. 1868) 86. Offenders of the kind are not admitted to testify as of course, and sufficient authority exists for saying that in the practice of the English court it is usual that a motion to the court is made for the purpose, and that the court, in view of all the circumstances, will admit or disallow the evidence as will best promote the ends of public justice. Id. 87; 3 Russ. Crimes (9th Am. Ed.) 598.

Good reasons exist to suppose that the same course is pursued in the courts of some of the states, where the English practice seems to have been adopted without much modification. *People v. Whipple*, 9 Cow. 707.

Such offenders everywhere are competent witnesses if they see fit voluntarily to appear and testify; but the course of proceeding in the courts of many of the states is quite different from that just described, the rule being that the court will not advise the attorney general how he shall conduct a criminal prosecution. Consequently it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the state.

Of all others, the prosecutor is best qualified to determine that question, as he alone is supposed to know what other evidence can be adduced to prove the criminal charge. Applications of the kind are not always to be granted, and in order to acquire the information necessary to determine the question, the public prosecutor will grant the accomplice an interview, with the understanding that any communications he may make to the prosecutor will be strictly confidential.

Interviews for the purpose mentioned are for mutual explanation, and do not absolutely commit either party; but if the accomplice is subsequently called and examined, he is equally entitled to a recommendation for executive clemency. Promise of pardon is never given in such an interview, nor any inducement held out beyond what the before-mentioned usage and practice of the courts allow.

Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfils those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.

Modifications of the practice doubtless exist in jurisdictions where the power of pardon does not exist prior to conviction; but every embarrassment of that sort may be removed by the prosecutor, as in the absence of any legislative prohibition he may not. pros. the indictment if pending, or advise the prisoner to plead guilty, he, the prisoner, reserving the right to retract his plea and plead over to the merits if his application for pardon shall be unsuccessful. 1 Bish. Cr. Proc. (2d Ed.) § 1076, and note.

Where the power of pardon exists before conviction as well as after, no such difficulties can arise, as the prisoner, if an attempt is made to put him to trial in spite of his equitable right to pardon, may move that the trial be postponed, and may support his motion by his own affidavit, when the court may properly insist to be informed of all the circumstances. Power under such circumstances is vested in the court in a proper case to put off the trial as long as may be necessary, in order that the case of the prisoner may be presented to the executive for decision.

Centuries have elapsed since the judicial usage referred to was substituted for the ancient practice of approvement, and experience shows that throughout that whole period it has proved, both here and in the country where it had its origin, to be a proper and satisfactory protection to the accomplice in all cases where he acts in good faith, and testifies fairly and fully to the whole truth. Cases undoubtedly have arisen where the accomplice, having refused to comply with the conditions annexed to his equitable right, has been subsequently tried and convicted, it being first determined that he has forfeited his equitable title to protection by his bad faith and false representations. *Com. v. Knapp*, 10 Pick. 477. Such offenders, if they make a full disclosure of all matters within their knowledge in favor of the prosecution, will not be subjected to

punishment; but if they refuse to testify, or testify falsely, they are to be tried, and may be convicted upon their own confession.

Nothing of weight by the way of judicial authority can be invoked in opposition to the views here expressed, as is evident from the brief filed by the defendants, which exhibits proof of research and diligence. Decided cases may be cited which contain unguarded expressions, of which the following are striking examples: *People v. Whipple*, supra; *U. S. v. Lee*, 4 McLean, 103, Fed. Cas. No. 15,588.

Neither of those cases, however, support the proposition for which they are cited. Enough appears in the first case to show that it was objected on behalf of the accomplice that the usage gave him no certain assurance of a pardon, inasmuch as the power of pardon was vested in the governor, and the authority of the court extended no further than the recommendation for mercy; to which the court responded, that the legal presumption was that the public faith will be preserved inviolate, and that the equitable claim of the party will be ratified and allowed.

Public policy and the great ends of justice, it was said in the second case, require that the arrangement between the public prosecutor and the accomplice should be carried out; and the court proceeded to remark, that if the district attorney failed to enter a nolle prosequi to the indictment, "the court will continue the cause until an application can be made for a pardon," which of itself is a complete recognition of the usage and practice established in the place of the ancient proceeding of approvement. More evil than good flowed from that regulation, and in consequence the practice now acknowledged was substituted in its place, under which the accomplice acquires only an equitable right to the clemency of the executive, which, as Lord Mansfield said, rests on usage and the good behavior of the accomplice, who in a proper case will be bailed by the court in order that he may apply for the pardon to which he is equitably entitled.

Should it be objected that the application may not be successful, the answer of the court must be in substance that given by Lord Denman on a similar occasion, that we are not to presume that the equitable title to mercy which the humblest and most criminal accomplice may thus acquire by testifying to the truth in a federal court will not be sacredly accorded to him by the president, in whom the pardoning power is vested by the federal constitution.

Having come to the conclusion that the district attorney had no authority to make the agreement alleged in the plea in bar, it follows that the circuit court erred in the two cases instituted there, in overruling the demurrer to it, and that the judgment must

be reversed, and the causes remanded for further proceedings in conformity with the opinion of the court.

Tested by these considerations, it is clear that the circuit court also erred in affirming the judgment of the district court in all the

other cases, and that the judgment in each of those cases must be reversed, and the causes remanded with directions to reverse the judgment of the district court, and for further proceedings in conformity with the opinion of the court; and it is so ordered.

HRONECK v. PEOPLE.

(24 N. E. 861, 134 Ill. 139.)

Supreme Court of Illinois. June 12, 1890.

Error to criminal court, Cook county.
Julius Goldzier, for plaintiff in error.
Geo. Hunt, Atty. Gen., for the People.

BAKER, J. The plaintiff in error, John Hroneck, was indicted with Frank Chapek, Frank Chleboun, and Rudolph Sevic for violation of an act of the legislature of this state entitled "An act to regulate the manufacture, transportation, use, and sale of explosives, and to punish an improper use of the same," approved June 16, 1887, and in force July 1, 1887. Rev. St. 1889, c. 38, §§ 542-547. The first count charged the defendants with unlawfully making dynamite, with the unlawful intention of destroying the lives of certain persons therein named; and in the five remaining counts the defendants were charged successively in such several counts with manufacturing, compounding, buying, selling, and procuring dynamite, with the same unlawful purpose and intent. The defendant Hroneck was alone put upon trial, and that trial resulted in a verdict of guilty, and fixing his punishment at 12 years' imprisonment in the penitentiary. Motions for a new trial and in arrest of judgment were severally overruled, and the said defendant was sentenced on the verdict. Numerous grounds are urged for reversal, which we shall consider, substantially, in the order they are made.

It is insisted that the statute upon which the prosecution is based is unconstitutional in that it is obnoxious to section 13 of article 4 of the constitution of the state, which provides "that no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The specific objection is made that two distinct subjects are expressed in the title. That objection is without merit. The act is entitled "An act to regulate the manufacture, transportation, use, and sale of explosives, and to punish an improper use of the same." The regulation of the use necessarily implies the right to punish an improper use. To "regulate" means to adjust by rule or regulation; and any attempt to fix rules for the manufacture, transportation, use, and sale of explosives that did not also prescribe punishment for violation of such rules and regulations would necessarily be imperfect. Two different subjects are not included or expressed in or by the title; for the punishment of an improper use flows necessarily and legitimately from the main or substantive object as stated in the title, *i. e.*, to regulate the use, etc., of explosives. It is not necessary that the title shall express all of the minor divisions of the general subject to which the act relates; and it is sufficient if it express the general subject of the act, and all the minor subdivisions germane to the general subject will be held to be included in it. But, if the title expresses such minor subdivisions, which without such expressions

would be held to be included within the general subject, such expression will not render the title obnoxious to the constitutional provision. *Plummer v. People*, 74 Ill. 361; *Fuller v. People*, 92 Ill. 182; *Magner v. People*, 97 Ill. 320; *Cole v. Hall*, 103 Ill. 30; *Prescott v. City of Chicago*, 60 Ill. 121; *Potwin v. Johnson*, 108 Ill. 71; *Timm v. Harrison*, 109 Ill. 593; *Hawthorn v. People*, Id. 302; *People v. Wright*, 70 Ill. 389; *City of Virden v. Allan*, 107 Ill. 505.

The contention that the statute itself treats of two separate and well-defined subjects is not tenable. It is said that the first three sections of the act relate to the "manufacture and use of explosives for illegal purposes," while the four remaining sections relate to "the manufacture, sale, and transportation of explosives for legitimate purposes." It is therefore claimed that the former sections should properly be found in the Criminal Code, and that they are not germane to the other sections of the act, which are mere police regulations. The general subject of the statute is the manufacture, transportation, use, and sale of explosives; and it cannot be said that because one section provides for a license or permit to be obtained for their manufacture, and another prohibits the storing of explosives within a certain distance of inhabited dwellings, and another punishes fraudulent acts to procure the transportation of explosives in public conveyances, that still another section, or other sections, making it unlawful to manufacture or procure such explosives with the intent to use the same for unlawful destruction of life or property, and affixing a penalty therefor, would not be within the same general subject of legislation. It can no more be said that the prohibition, under a penalty, against storing explosives in dangerous proximity to a dwelling, is a police regulation, than that a like prohibition against manufacturing or procuring the same for an unlawful use or purpose is a police regulation. All of the provisions of the act are within the subject expressed in the title, and are germane to each other, and to the general scope and purpose of the act.

It is next claimed that the section of the statute under which this indictment was prosecuted is not sufficiently definite to authorize imprisonment in the penitentiary. Section 1 of the act provides that whoever shall be guilty of the acts therein denounced "shall be deemed guilty of felony, and upon conviction thereof shall be punished by imprisonment for a term of not less than five years, nor more than twenty-five years." It is urged that as it is not stated the imprisonment shall be in the penitentiary, and the statute is highly penal, and requires strict construction, a sentence thereunder to the penitentiary cannot be sustained. We are not prepared to adopt this view. The offense is by the act declared to be a felony. A felony is by the Criminal Code of the state declared to be an offense punishable by death or confinement in the penitentiary. Rev. St. 1889, c. 38, § 277. While the legislature undoubtedly may provide for the punishment of misdemeanors by imprisonment in the penitentiary, and undoubtedly might, if

they saw proper, punish felonies otherwise than by imprisonment in the penitentiary, yet there is nothing in these sections of the act which indicates an intention to do the latter. Applying the well-known rule that a criminal statute is to be strictly construed, and that nothing is to be taken by intendment or implication against the accused beyond the literal and obvious meaning of the statute, it is nevertheless clear, we think, when this statute is considered in connection with the general Criminal Code, which it must be presumed the legislature had in contemplation when passing it, the punishment to be inflicted for violation of said sections of the act is by imprisonment in the penitentiary.

It is insisted that the verdict is void for uncertainty, in that it simply finds "the defendant" guilty, without specifying the plaintiff in error by name. Before plaintiff in error was put upon trial a separate trial had been awarded to the defendants Chapek and Sevic. The defendant Chleboun was not put upon trial, but was used as a witness on behalf of the people. The record shows that on the 26th day of November, 1888, at the term of the criminal court then being held, the following proceedings were had and entered of record, to-wit: "The People of the State of Illinois v. John Hroneck, impleaded," etc. "This day come the said people by Joel M. Longnecker, state's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes. And now, issue being joined, it is ordered that a jury come," etc. Then follows the impaneling of a jury. It is manifest from the foregoing that no one was put upon trial other than the defendant Hroneck, and the verdict finding "the defendant" guilty could not refer to any other defendant. There was no uncertainty in the verdict.

Complaint is made of the second instruction given on behalf of the people. That instruction told the jury that any person abetting or assisting in the perpetration of the offense mentioned in section 1 of the act was upon conviction to be punished as provided in said first section. This was not error. The statute provides that any person abetting or in any way assisting in making, manufacturing, buying, procuring, etc., such explosives, etc., knowing or having reason to believe that the same are intended to be used by any person or persons in any way for the unlawful injury to or destruction of life or property, shall be deemed a principal, and upon conviction shall be subject to the same punishment as provided in section 1 of the act. Under this statute a defendant, if guilty as an accessory before the fact, is to be indicted and punished as a principal. In view of the evidence tending to show the connection of plaintiff in error with the other defendants in the perpetration of the offense, the instruction was entirely proper.

It is objected that the court erred in refusing an instruction that the evidence of private detectives and of the police "should be received with a large degree of caution." This instruction does not contain a correct proposition of law. All the circumstances connected with a witness, or that

might tend to affect his credibility or bias his judgment, are competent to be shown to and considered by the jury in determining the weight and credit to be given to his testimony. In view of the facts and circumstances thus shown, it is for the jury to determine its weight as matter of fact.

It is urged that the court erred in modifying an instruction asked by the defendant. The instruction as asked was as follows: "The jury are instructed that, to constitute the crime charged against the defendant in the indictment, two things are necessary, namely: *First*, the making, manufacturing, compounding, buying, selling, or disposing of the dynamite, or some portion thereof, described in the indictment, on or subsequent to the 1st day of July, A. D. 1887." To this the court added the following: "Therefore the jury must disregard any evidence as to the making or compounding or procuring of any dynamite at Chapek's house or elsewhere prior to said date." The instruction then proceeds: "*Second*," etc. Hroneck's defense in part consisted in accounting for the dynamite found in his possession by testifying that it was left in his house in the fall of 1886 by one Karafiat; and it became important for the jury to consider testimony tending to show that he was in possession of dynamite in the spring of 1887 prior to the law under which he was prosecuted going into effect, on the 1st day of July of that year. It is insisted that the effect of the modification was to take from the consideration of the jury this evidence offered by the defendant of prior possession of the explosives. It is conceded that such was not the purpose, and it is clear to us that such was not the effect, of the modification. The instruction related solely to the elements necessary to constitute the crime charged. The jury were told that, to constitute the crime, it was necessary that the making, etc., of the dynamite must have been on or subsequent to the 1st day of July, 1887, and that therefore the jury must disregard the making or procuring, etc., prior to that date. It must be presumed that the jury were men of reasonable intelligence, and would understand that what followed the introductory part of the instruction related to what was necessary to constitute the crime, and not to the defense set up, that the dynamite was in the possession of the defendant prior to the date fixed by the instruction. Moreover the jury, by a lengthy series of instructions, were fairly instructed as to the law of the case,—fully as favorably to the defendant as he could rightfully ask. They were told that they must consider all the facts and circumstances proven, and determine therefrom whether the defendant procured, etc., the explosives in question after the law went into force, and that his possession prior thereto would raise no presumption of guilt. It is, we think, impossible that the jury could have been misled to the prejudice of the plaintiff in error by the modification. It is not contended that the instruction, when considered as defining what would constitute guilt of the crime charged, and what the jury

might properly consider in respect thereof, is not a substantially accurate statement of the law. As the jury were not misled by the modification to the prejudice of the plaintiff in error, he has no cause of complaint.

Objection is made to the competency of Frank Chleboun, a witness for the people, who was permitted to testify over the objection of the defendant. He was examined upon his *voir dire*, and avowed his belief in the existence of God and "a hereafter;" that he believed, if he swore falsely, he would be punished under the criminal laws of the state; that he had never thought seriously of whether God would punish him either in this world or the next, and had never considered the question whether he would be punished for false swearing in any other way than by that inflicted by the law. He had, it seems, no religious belief or conviction of his accountability to the Supreme Being, either in this world or in any after life. The test of the competency of a witness in respect to religious belief, as generally held, is, does the witness believe in God, and that he will punish him if he swears falsely? It is stated by Rapalje in his Law of Witnesses (section 11) that "the great weight of authority in this country now is that it is immaterial whether the witness believes God's vengeance will overtake him before or after death." This doctrine was approved in *Railroad Co. v. Rockafellow*, 17 Ill. 541, where, after a consideration of the authorities, it was held that all persons are competent to be sworn as witnesses who believe there is a God, and that he will punish them, either in this world or the next, if they swear falsely, and that a want of such belief rendered them incompetent to take an oath as witnesses. This case, seemingly, overruled the doctrine of the earlier case of *Noble v. People*, Breese, 54. Without pausing here to determine whether the court erred in subjecting the witness to an examination touching his religious belief, (Rap. Wit. § 12, and cases cited,) it may be said that the better practice, and that which now prevails, forbids the examination of the witness in respect thereof on his *voir dire*. If there was error in this regard, it was committed at the instance of the defendant, and in his interest; and he cannot complain.

Returning to the question of the competency of the witness, the rule seems to be as above stated, unless changed by constitutional provision or legislative enactment. The tendency of modern times by the courts and in legislation is towards liberalizing the rule, and in many jurisdictions incompetency for the want of religious belief has been abolished. See Rap. Wit. § 13, and Whart. Ev. § 395. Has the rule announced by this court in *Railroad Co. v. Rockafellow* been changed in this state? By section 3 of article 2 of the constitution of 1870, it would seem that a radical change was effected in respect to the matter under consideration. This section guarantees non-interference of the state with the religious faith of its citizens. In *Chase v. Cheney*, 58 Ill. 509, it was said: "The only exception to uncontrolled lib-

erty is that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the state shall not be justified." The section provides: "No person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state." No religious belief is required to qualify a citizen to take an oath, and no citizen can be excused from taking an oath or affirmation because of his religious belief. The liberty of conscience secured by the constitution is not to be construed as dispensing with oaths or affirmations in cases where the same are required by law. No man, because of his religious belief, is to be excused from taking the prescribed oath of office before entering upon the discharge of the public duty; nor can he be permitted to testify because of such religious belief or opinion except upon taking the oath, or making the affirmation, required by law. Now, as before the adoption of this provision, oaths are to be taken, and affirmations made, whenever required by law; but the right to take such oath or make such affirmation, if such right be a civil right, privilege, or capacity, cannot be denied to any citizen. It is said that one who holds proscribed religious opinions is incompetent—that is, has not the legal capacity—to testify. The incapacity, if it exists, grows out of, and is based upon, his failure to hold certain religious beliefs and opinions in accord with the prevailing religious opinions of the people; and the contention is that he should not, by reason of such incapacity, be permitted to testify, however great and important the interest at stake to himself, his family, his neighbor, or the state. It is clear from the authorities that the rule contended for does not apply when the witness is testifying in his own behalf; but if the life, liberty, reputation, or property of his family or neighbor be involved, or his testimony be necessary to the protection of society, he is, under such rule, to be excluded from the privilege of testifying in courts of justice because of such incapacity. If it exists at all, the incapacity is created by law, and it is therefore a civil incapacity. The constitution provides that no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions. In *Bouvier's Law Dictionary*, capacity is defined to be "ability, power, qualification, or competency of persons, natural or artificial, for the performance of civil acts depending on their state or condition as defined or fixed by law." It is also defined as follows: "Power; competency; qualification; ability, power, or qualification to do certain acts." 2 Amer. & Eng. Cyclop. Law, 722. The obvious meaning of the provision in the constitution is that whatever civil rights, privileges, or capacities belong to or are enjoyed by citizens generally, shall not be taken from or denied to any person on account of his religious opinions. As said by the supreme court of Kentucky in construing a similar pro-

vision of the constitution of that state in *Bush v. Com.*, 80 Ky. 244: "It is a declaration of an absolute equality, which is violated when one class of citizens is held to have the civil capacity to testify in a court of justice because they entertain a certain opinion in regard to religion, while another class is denied to possess that capacity because they do not conform to the prescribed belief." It is manifest that, if the legislature may prescribe the test of belief in rewards and punishments, they may impose any other test or qualification that, in the judgment of those entertaining the dominant belief, may be necessary to afford the requisite sanction. In *Perry's Case*, 3 Grat. 632, a like conclusion was reached in construing a constitutional provision that "all men shall be free to profess, and by argument maintain, their opinions in matters of religion; and the same shall in no wise affect, diminish, or enlarge their civil capacities." We are of the opinion that the effect of this constitutional provision is to abrogate the rule which obtained in this state prior to the constitution of 1870, and that there is no longer any test or qualification in respect to religious opinion or belief, or want of the same, which affects the competency of citizens to testify as witnesses in courts of justice. It follows that there was no error in permitting the witness to testify.

The only remaining question which we deem it necessary to consider is the claim that the evidence is insufficient to warrant a conviction. It is insisted that there is no proof of the *corpus delicti*. The *corpus delicti* of the offense charged in the indictment is the making, procuring, etc., of dynamite with intent to use the same for the unlawful destruction of the lives of the persons named in the indictment. At the time of the arrest of plaintiff in error, a large quantity of dynamite, and a number of bombs of different make and material, were found in his possession. It was proved that he said, as indicating his intent, that he must kill Gary, Grinnell, and Bonfield, and that he would throw the bombs at them. In his statement made to the officers after his arrest, which was reduced to writing, and which he introduced in evidence at the trial, it appears that he went with Chleboun and Chapek to Aldine square for the purpose of finding Grinnell's residence, and that the intent of his companions, as expressed at the time, was to find Grinnell's house, and that they were talking of killing Bonfield. It appears, also, that he pointed out to said persons Grinnell's house, or what he thought to be his house. It is also shown that, on different occasions, he threatened to take the lives of the three persons named in the indictment, and said that he would throw the bombs at them in the court-rooms, or on the street, or wherever he might meet them. Indeed, it is not questioned that there is sufficient evidence of the intent of plaintiff in error to destroy the lives of said persons by means of such explosives, if it was believed by the jury to be true. It is insisted, however, that there can be no presumption that Hroneck had procured the dynamite with the unlawful intent indicated from the fact that

such dynamite was found in his possession. Where a party is found in possession of explosives, and has the avowed intention of using them for a particular purpose, the presumption would arise that he procured the same for such unlawful use. It is to be remarked that there was nothing in the business or vocation of Hroneck that would call for or require the use or possession of explosives. Moreover, it was shown by the witness Chleboun that he was at Hroneck's house the last Sunday in May, 1888, when Hroneck showed him some unfilled bombs, and Hroneck then said that he would get dynamite with which to load them. He at that time spoke of an opportunity he had to kill Bonfield, that he did not do it because he didn't have the necessary weapon, but that he regretted it very much. The witness saw no dynamite that day. In June following the witness again saw Hroneck at his request, and Hroneck had a number of bombs which were charged. Some of them had fuses attached, and others had fulminating caps. Can it be questioned that, if no explanation had been offered by Hroneck as to when and how he came into the possession of the dynamite, the fact of its being in his possession in the month of June with the avowed intent of using it in the particular unlawful way charged, coupled with his declaration in May that he would procure dynamite for the accomplishment of such unlawful purpose, would be sufficient to maintain a conviction for unlawfully procuring the explosive with the intent to use the same? In other words, would not the jury be justified in finding therefrom that the *corpus delicti* had been proved? The fact that he procured the explosive is shown by his having it in his possession. The unlawful intent is manifested by the character of the substance itself, his concealment of it, and his contemporaneous declarations of his intent. A jury, from the necessity of the case, must be allowed to draw conclusions from the facts proved; and intent can ordinarily be shown only by inferences drawn from the acts of the party, and from his declarations. Hroneck is here shown to have been in the actual possession of the dynamite in June, 1888, and subsequently, by unquestioned evidence; and the fact of his intention is shown by his declarations and acts. If, from the facts proved, the conclusion is irresistible, if the testimony is believed, that the offense was committed, then the *corpus delicti* is established.

Some question is made in respect of the evidence of the date when the dynamite was procured by Hroneck. He testified that one Karadit left it at his house in the fall of 1886, and had never called for it. Without entering into a discussion of the evidence, it must be said that there was much in his own testimony, as there was also in the testimony of the witness Chleboun, that tended to discredit his evidence. The question was fully and fairly submitted to the jury as to whether or not he procured the dynamite with the unlawful intent charged, after the 1st day of July, 1887, when the statute went into effect. They were told in numerous instructions that

unless they believed from the evidence, beyond a reasonable doubt, that he procured the same, with the specific intent charged, on or subsequent to that date, they must acquit.

Without extending this opinion—already too long—by an analysis of the evidence, it must suffice for us to say that we have carefully considered the record, and the facts and circumstances proved, and are unable to say that the jury were palpably wrong in the conclusion reached by them. It is not enough that we, sitting as a jury, might have found differently. They saw

the witnesses, had means of determining their credibility which we do not possess; and, before we would be justified in setting aside their verdict for error in finding of fact, the error must be palpable.

Other minor objections are urged, which we have carefully considered, and there is no reversible error in them; and no good purpose would be served, either to the defendant or the profession, by their discussion. We find no error in this record for which the judgment of the court below should be reversed, and it is accordingly affirmed.

BLAKESLEE v. DYE.

(27 Pac. 881, 1 Colo. App. 118.)

Court of Appeals of Colorado. Oct. 12, 1891.

Error to Otero county court; C. W. Bomgardner, Judge.

James H. Dye sued Wilnot Blakeslee for commissions for selling defendant's property. Judgment for plaintiff. Defendant brings error. Reversed.

James Hoffmire, for plaintiff in error. A. F. Thompson, for defendant in error.

BISSELL, J. Dye brought this action against Blakeslee before a justice in Otero county to recover \$125, which he claimed as a commission upon the sale of certain property belonging to Blakeslee. After a trial before the justice an appeal was taken to the county court, where the action was tried by a jury, which found a verdict of \$50 in favor of the plaintiff, on which the judgment was entered whereon error is assigned. During the progress of the litigation in the county court, the plaintiff, Dye, sued out a dedimus to take testimony of one Desent in Fayette county, Iowa. Divers errors are insisted upon and argued by counsel in their briefs, but the only one important to consider is that predicated upon the form of the dedimus under which the testimony was taken. The writ appears in the record, and was apparently issued by the judge of the county court acting as his own clerk. It is

without a seal or any other form of authentication. A motion was made prior to the trial to suppress the deposition because of this irregularity. The error is well assigned. The statute requires (Code 1887, § 349) that the deposition of a witness residing out of the state must be taken upon a commission to be issued by the clerk under the seal of the court. This statute is but declaratory of the law as it existed prior to this enactment. The seal of the court was always a necessary and essential part of every writ issued at the common law. In no other manner did a court of record authenticate its process. It is clear under the authorities that a dedimus is a writ, and that it is a process requiring a seal. *Freeman v. Lewis*, 5 Ired. 91; *Ford v. Williams*, 24 N. Y. 359; *Tracy v. Suydam*, 30 Barb. 110; *Churchill v. Carter*, 15 Hun, 385; *Byington v. Moore*, 62 Iowa, 470, 17 N. W. 644. The statutory provision is in harmony with the general law upon the subject. It must, therefore, be true that the specific requirement of the statute upon the subject must be observed in order to render the process available as an authority to an officer to take the testimony, and that without it the writ would be a nullity, and a deposition taken under it would be inadmissible as evidence. The motion to suppress the deposition should have been sustained, and for the error of the court in this particular the cause must be reversed and remanded.

CHASE v. GARRETSON.

(23 Atl. 353, 54 N. J. Law, 42.)

Supreme Court of New Jersey. Jan. 22, 1892.

On rule to show cause why a new trial should not be granted. Cause tried in the Essex county circuit court before Justice De-pue and a jury.

Action by Selon H. Chase against Garret Garretson to recover on a note. Verdict for defendant. Rule to show cause why a new trial should not be granted. Rule dismissed.

Argued February term, 1891, before BEASLEY, C. J., and MAGIE, DIXON, and GARRISON, JJ.

F. E. Bradner, for plaintiff. John S. Voorhees, for defendant.

GARRISON, J. This is an action on a promissory note, the making and indorsement of which were admitted at the trial. The defense was that the note had been obtained by false representations, of which there was some proof. The plaintiff offered in evidence certain depositions which had been received by the trial court, properly sealed. What these depositions contained we do not know, as the state of the case is silent upon that point. The justice before whom the case was tried excluded these depositions, upon the ground that the supreme court commissioner before whom they had been taken had not certified any reason for taking them; and upon the further ground that, whereas they were taken upon short notice, it did not appear by the certificate of the commissioner that the case, in his opinion, required such short notice. The verdict was for the defendant, whereupon this rule to show cause why a new trial should not be granted was allowed. The question is whether the depositions should have been received in evidence. The affidavits in question had been taken at Newark, N. J., before a supreme court commissioner, upon short notice, in the absence of the adverse party. The certificate of the officer who took them was in these words: "I, A. B. C. Salmon, supreme court commissioner, do hereby certify that the witnesses above named herein appeared personally before me, were duly sworn by me, and examined by plaintiff's attorney, and gave evidence as is set out above; that such other and further proceedings were had as shown by this transcript. A. B. C. Salmon, Sup. Ct. Comm'r." The notice stated that the witnesses to be examined were about to leave this state, but the certificate of the commissioner is silent as to the reasons why he took the affidavits, or whether, in his opinion, the case was one requiring short notice. In this condition of affairs the party who had procured the taking of the depositions offered to supply by oral proof evidence as to the reasons which moved the commissioner to take the affida-

vits, and that the commissioner had fixed the time for taking the same, and had authorized the giving of the notice. The overruling of this offer raises the only question before us. The privilege of producing, upon the trial of an issue of fact, affidavits taken elsewhere, is so marked a departure from the ordinary course of trials that every safeguard thrown by the legislature around the extraordinary procedure should be upheld. Upon this point there is entire unanimity of judicial sentiment. Chief Justice Kirkpatrick, in the case of Hendricks v. Craig, 5 N. J. Law, 568, speaking of commissions to take testimony, said: "As the power to take the testimony of absent witnesses is a new power, created by statute, the rule is that it must be pursued strictly." To the same effect is the language of Ryerson, J., in Sayre v. Sayre, 14 N. J. Law, 487-492: "The statute is an innovation on a great and valuable principle of the common law that the witness shall be produced before the jury, who are to judge, as well from his manner as otherwise, of the credit to which he is entitled." "I do not think," said this learned judge, with marked discrimination, "that this is a case where the legislature have ingrafted a new principle on the common law which the court are to regard as a principle, and give efficiency to it in practice. They have only made an exception, and the party has not brought himself within it." "This statute," said Chancellor Zabriskie, speaking of the same act, "creates a new power contrary to the settled practice, and should therefore be strictly construed and strictly complied with." Parker v. Hayes, 23 N. J. Eq. 186, 187. In the case of Moran v. Green, 21 N. J. Law, 562-569, Chief Justice Hornblower, while relaxing the rule as to the directory parts of the statute in reference to the filing of the affidavits, says: "For the due observation of everything relating to these matters, the party suing out the commission is alone responsible; but when he has got it back into the hands of a judge of the court, out of which it issued, he has done all the law requires him to do,"—an exception which, it will be observed, instead of loosening the rule, rather emphasizes it, so far as the present case is concerned. If we are to be guided by the views thus expressed, there will be no difficulty in giving a construction to the statute under which these depositions have been taken. The section in question is this (Revision, p. 382, § 25): "If any material witness in an action or suit of a civil nature," etc., "is about to leave the state, [his deposition may be taken de bene esse]: provided, that the officer before whom the deposition is to be taken shall cause notice to be given to the adverse party immediately, or at such short day as the case, in the opinion of the said officer, may require, to attend and be present at the taking thereof, and to put questions and cross-examine, if he shall think fit." As has been shown, the con-

sensus of judicial opinion favors that construction of this statute which gives to the language employed its plain and unmistakable meaning. The act says that there shall be a certificate by the officer who took the affidavits of the reasons for their being taken, and of the notice given to the adverse party. Revision, p. 382, § 27. The entire matter is a creature of legislative enactment, so that it is difficult to see by what power these statutory provisions can be altered by this court, even if it were deemed advisable to dispense with them. Apart, however, from authority, there are cogent reasons why these jurisdictional matters should appear to the trial court by official certificate rather than by oral proofs. In the first place, they concern matters resting in the bosom of the official who makes the adjudication, and hence cannot safely be the subject of oral testimony from the mouths of others. The reasons which move the officer to take the affidavits, and his opinion as to the facts required by the exigencies of the case before him, are known to himself. The best evidence, therefore, is his own statement. All else is hearsay or surmise. Further, it is evident that the cases in which contention will arise are those in which the depositions have been taken in the absence of the adverse party; for, if he appear and cross-examine the witnesses, his presence or his conduct may be such as to waive his right to insist upon the statutory provisions designed for his protection. In this respect each case must be determined upon the general principles applicable to its peculiar features. But where the return of the officer shows that the affidavits were taken in the presence only of the party procuring them, the adverse party has a right to insist that they shall become evidence against him only when delivered to the trial court, with the jurisdictional facts proved in the manner prescribed by the statute. To hold otherwise would be to place it within the power of the party who had procured the proofs, and who alone was represented at their taking, to adduce testimony in their support, which, under the circumstances, it would be entirely beyond the power of the absent party to gain-say, or even to verify, except by calling the officer himself; thus shifting the burden of proof in an oppressive and unwarranted manner. When we consider that the matters to be proved are the reasons which operated upon the mind of the official, and his opin-

ion as to the necessity of short notice, we shall see the difficulty and danger of permitting such matters to rest in oral proofs offered by an interested party during the course of a trial,—difficulties and dangers which are incurred solely by an arbitrary disregard of the provisions of the statute, which plainly enacts that these matters are to be shown by the certificate of the officer. As between these two lines of practice, if the language of the statute was open equally to either construction, I should deem the construction indicated most consonant with correct principle and sound policy. When to this conclusion is added the weight of judicial opinion as to the spirit in which acts of this kind are to be construed, and the legislative intent is expressed in unambiguous language, I can see neither reason nor authority for permitting the substitution of oral testimony for the official certificate required by the statute under review.

Section 43 of an act concerning evidence (Revision, p. 385) does not reach the infirmity of the certificate now before us. That section provides that any deposition may be overruled upon objections to the competency of witnesses or of testimony, or to the regularity of questions, but "shall not be excluded for any irregularity or informality in taking or returning the same, if the court in which the same is offered shall be satisfied that the testimony of the witnesses has been fairly and truly taken and returned." The taking of testimony here mentioned refers to the mode in which the witness is interrogated, and to the form in which his testimony is transcribed, and the returning of the depositions refers to their custody from the time they are sealed by the commissioner until they are delivered to the court. But nothing in this act alters the previous provisions as to what the certificate shall contain. Moreover, these irregularities are to be overlooked only when the court is satisfied concerning the fairness with which the testimony was taken. But, under the views above expressed, it would be *petitio principii* to say that depositions which cannot be received, because not properly accredited, may be used to satisfy the mind of the court by their internal evidence concerning the manner in which the testimony was taken. Such a course would not be overlooking an irregularity; it would be abrogating a legislative provision. The rule to show cause should be dismissed, with costs.

CITY OF SANDWICH v. DOLAN.

(42 Ill. App. 53.)

Appellate Courts of Illinois. Dec. 7, 1891.

Appeal from circuit court, Dekalb county; Charles Kellum, Judge.

W. & W. D. Barge, for appellant. C. A. Bishop and Samuel Alschuler, for appellee.

CARTWRIGHT, J. This case has been before this court and the supreme court on former appeals by the present appellant, and is reported in 34 Ill. App. 199, and 133 Ill. 177, 24 N. E. 526. The case has been again tried in the circuit court, resulting in a somewhat increased verdict for appellee in the sum of \$3,000. That the sidewalk upon which the accident occurred was, and for a long time had been, out of repair and in very bad condition is not denied, but is admitted by appellant; nor is it denied that the accident of appellee, falling upon it by reason of its defective condition, occurred as claimed by her; but it is contended on the part of appellant that the jury were not justified in finding that the injuries complained of resulted from the fall, nor that appellee was in the exercise of ordinary care, and that the court erred in refusing to admit certain evidence offered by appellant and in giving and refusing instructions. The circumstances under which the accident happened are detailed in the former opinion of this court, and need not be repeated here. The facts proven upon the retrial appear to be substantially the same as stated in that opinion, except that the health and bodily condition of appellee was shown to be worse than at the time of the first trial. The record shows some contradiction among the doctors as to whether the eighth rib was broken at the time of the fall or at a subsequent time, and those testifying for appellant say that the twelfth rib was not broken, but that where there was a bunch on the side of appellee, the attaching cartilage from the ninth rib, several inches in length, was broken or torn, which fact they do not regard as of much consequence. A consideration of all the evidence on those subjects satisfies us that the injuries to appellee resulted from the fall, and that injurious consequences, permanent and progressive in their nature, have already taken place, and are to be reasonably apprehended in the future. With respect to the question of the degree of care exercised by appellee, the evidence shows that in the manner of using the walk she exercised ordinary care, and that the accident resulted from no act or omission on her part, but from her son stepping on a board which flew up in front of her and tripped her so that she fell; and the main contention of appellant is that she was negligent in using the walk at all. Considering this proposition as a question of fact, it appears that this walk was the direct route from the Congregational

Church, where appellee had been, to her home, where she was going; that it was an ordinary walk, and its infirmity consisted in loose boards on account of decayed stringers; that she was accustomed to travel upon it frequently; that it was used by the public without notice or prohibition by appellant; that it was not palpably dangerous to use it at all, and that, so far as appears, the previous use of the walk in its existing condition had been without accident.

There was some evidence that a portion of the walk on the opposite side of the street, which it is said she should have used, was in about the same condition as this. She was certainly not obliged to take a more circuitous route if she thereby would encounter equal danger. We think that she was not negligent in exercising her undoubted right to the use of the walk in going to her home. Upon the trial appellant called as a witness Harold M. Moyer, a doctor, who testified that he examined appellee at the instance of appellant to ascertain the existence or nonexistence of injuries claimed to exist, and their extent. The object and purport of his testimony was to show, so far as nervous, spinal, and muscular symptoms of injury were concerned, that she was exaggerating or feigning. He testified that such was his belief as to symptoms relative to the spine, and that he examined the spine and muscles and measured the arms. He thought she did not experience the symptoms which she stated. He further stated that he wanted to examine the muscles with a battery, but that she objected to it. He gave as a reason for wanting to make such a test that the battery would show the amount of electricity required to produce contraction of a muscle, and would show, apart from any statement of the patient, indications of health or disease. Appellant afterwards examined as a witness G. W. Nesbit, another doctor, who was present and assisted at Moyer's examination of appellee; but no testimony was elicited from Nesbit about any proposal to examine appellee with a battery, or any refusal on her part. After appellant had completed its defense, Mrs. M. P. Johnson, Dr. Bryant, James Dolan, and appellee, all of whom were present at the examination by Moyer, testified in rebuttal that Moyer did not propose to examine appellee with a battery, and that she did not refuse to permit such an examination. After the evidence in rebuttal, appellant recalled Dr. Nesbit, and proposed to have him testify that Dr. Moyer had a battery there, and that appellee said that he could not use it on her. On objection this was not permitted, and it is insisted that this was error. The well-settled rule of practice is that when a plaintiff, holding the affirmative of the issue, as in this case, has given all the evidence he proposes to offer in support of the issue, the defendant shall then introduce all proof in contradiction of the proof adduced by the plaintiff and establish-

ing matters of defense, and the plaintiff may then rebut affirmative evidence introduced by defendant. If new and affirmative matter is introduced in rebuttal, the defendant may meet and overthrow it, but that is the extent of defendant's right in surrebuttal, and any departure from the rule is matter of indulgence and discretion in the court, not ordinarily subject to review. After the defendant is fully apprised by plaintiff's evidence of the ground upon which a recovery is to be had, if at all, it is the plain duty of the defendant to meet the case made by whatever proof he may have and intend to use. *Thomp. Trials*, §§ 344-347. It is true that neither party is bound to maintain the credibility of his witnesses until it is assailed by the opposite party, and some attempt made to impeach their credibility; and so at any stage of the case, if evidence should be offered for no other purpose than to impeach their credibility, the party in interest may support their credibility by additional testimony. In the case of *Wade v. Thayer*, 40 Cal. 578, witnesses testified that several persons who had testified to an occurrence were not present at the time of the occurrence. This was not testimony as to any fact material to the issue, but was manifestly offered only to impeach witnesses by showing that their testimony was manufactured.

The court say: "The evidence on behalf of the plaintiff to the effect that these witnesses of the defendants were not present, could have been offered for no other purpose than to impeach their credibility, and was competent for this purpose." It is a well-settled rule that a party whose witnesses are sought to be impeached by proof of this character may support their credibility by rebutting evidence, and it was held that defendants had a right to show that the witnesses were present. In the case of *Richardson v. Lessees of Stewart*, 4 Bin. 198, evidence tending to show an interest of a witness in the subject-matter of a suit was offered, and could have been for no other purpose except to affect his credibility. He had testified that he had no interest, and the court say that the evidence was an attack on his character and that the party had a right to introduce a deed showing that he parted with his interest before he testified. In the present case appellee introduced her evidence of the nature and extent of her injuries. If appellant claimed that she exaggerated or feigned the symptoms which she manifested and related, it was important and substantial matter of defense. If she had refused to submit to an examination which would disclose the truth it would tend to show that the symptoms were exaggerated or feigned. Appellant had no right to present that defense by piecemeal. The evidence rebutting the testimony of Dr. Moyer as to the material fact was not impeaching evidence in any sense, and did not tend to discredit him in any different manner than

that in which any contradiction discredits a witness. Mere contradiction among witnesses as to facts furnishes no basis for attempting to prove the fact over again by new witnesses. If upon each contradiction a party would be entitled to produce a new witness there would be practically no limit to their production. Nor was there any element of surprise in the production of the rebutting testimony. When appellant was introducing testimony so damaging to appellee as that of Dr. Moyer, it would necessarily be anticipated that appellee would meet and contradict it if in her power to do so, and the presence of the other witnesses at that examination who could testify as to what occurred there was well known. There was no error in the exclusion of the offered evidence. Its admission at that time rested in the discretion of the court.

The court refused two instructions prepared by appellant's counsel, both of which declared that if the evidence showed the sidewalk to be unsafe, and that appellee knew it to be unsafe, then it was her duty to keep off the sidewalk and not go upon it. These instructions were clearly not in accordance with the law. The question whether appellee was negligent in going upon this walk was one of fact for the jury, and any knowledge on her part of its condition was to be taken into account in deciding that question; but the question itself was for the jury. The court, at the instance of appellant, gave several instructions presenting in varying language the question upon the evidence whether she was in the exercise of reasonable care and caution in going upon and using the sidewalk; and these were correct. In *City of Flora v. Naney* (Ill. Sup.) 26 N. E. 645, error was assigned, upon the refusal of an instruction stating that the plaintiff would be precluded from a recovery if she went upon the sidewalk, or continued to walk thereon, after she had observed that it was out of repair. The court say: "But if the plaintiff knew that the sidewalk was out of repair, the law did not require her to go out into the street and pass around the walk. Although a person goes upon a sidewalk knowing it to be out of repair, recovery may be had for an injury received, if ordinary and reasonable care has been used." It was held not error to refuse the instruction. When the present case was before the supreme court it was said: "Whether it was obligatory on plaintiff to travel over one walk or the other was a question which it was not the province of the court to determine as a matter of law." *City of Sandwich v. Dolan*, 133 Ill. 177, 24 N. E. 526.

It is insisted that the court erred in giving an instruction prepared by appellee as follows: "If the jury believe from the evidence that any witness has willfully sworn falsely on this trial, as to any matter or thing material to the issues in the case, then the jury

are at liberty to disregard the entire testimony of such witness except in so far as it has been corroborated by other credible evidence or by facts and circumstances proved on the trial." The objections made to this instruction are: First, that the jury would understand it to apply to the witnesses for defendant only, and that it was therefore erroneous as only applying to the witnesses on one side and as an intimation that in the judgment of the court they were more to be suspected than those on the other side; and, second, because it did not mention the name of any witness or witnesses. The instruction is not subject to the first objection. It has no more application to the witnesses for one party than the other, and could not be drawn in more general terms. The second objection is not tenable. While instructions alluding directly to a witness have been sustained, the better practice is doubtless not to direct such an instruction against a particular wit-

ness or class of witnesses. *Insurance Co. v. La Pointe*, 118 Ill. 384, 8 N. E. 353; *Thomp. Trials*, § 2421.

The jury might readily understand that in the judgment of the court there was something in the testimony of the witness or witnesses named upon which to base the instruction, and to make the general rule peculiarly applicable to such witness or witnesses as distinguished from the others. It is certainly not an objection that the court has failed to make such direct application of the rule to some witness or witnesses. In *Martin v. People*, 54 Ill. 225, it is said: "A court can hardly err in refusing to give any instruction which seems designed to influence a jury as to the credit to be given to particular witnesses." Some other minor objections are made to the language of instructions given, but we think the instructions were properly given. The judgment will be affirmed.

Judgment affirmed.

ROBERTSON v. CRAVER.

(55 N. W. 492, 88 Iowa, 381.)

Supreme Court of Iowa. May 20, 1893.

Appeal from district court, Poweshiek county; A. R. Dewey, Judge.

Action for breach of promise of marriage. Jury trial. Verdict and judgment for plaintiff. Defendant appeals.

John T. Scott and H. S. Winslow, for appellant. Haines & Lyman, for appellee.

KINNE, J. 1. It is averred that plaintiff and defendant, in January, 1891, entered into a marriage engagement; that the marriage was to take place about December 25, 1891; that in April, 1891, the defendant married another woman, and thus put it out of his power to perform his contract with the plaintiff. The answer admits the marriage of the defendant, and denies the other allegations of the petition.

2. Plaintiff was asked, "Do you know whether or not he [the defendant] bought his father's homestead?" The question was objected to as leading, suggestive, incompetent, and calling for a conclusion. She answered: "Yes, sir; he told me he had bought his father's place the first time I saw him after he was married." Defendant moved to strike out the answer as incompetent and immaterial; the statement having been made since the defendant's marriage, and referring to matters occurring after his marriage. The motion was overruled. Questions so framed are not necessarily leading. *Woolheather v. Risley*, 38 Iowa, 486; *State v. Watson*, 81 Iowa, 383, 46 N. W. Rep. 868. It is sometimes permissible to direct the attention of the witness to the particular fact about which information is sought. *Graves v. Insurance Co.*, 82 Iowa, 637, 49 N. W. Rep. 65. The purchase of a homestead was a fact. The question did not call for a conclusion. The ruling was without prejudice, as the same fact was testified to by another witness, and was not disputed.

3. Plaintiff was also asked, on direct examination, this question: "When you heard that he was married, how did it affect you?" It was objected to as incompetent and immaterial, and the objection overruled. She answered, "I hated it awful bad." The question, we think, was proper. It called for facts touching her condition, mental and physical, as a result of the marriage. The answer, though not in good form, was but one way of expressing the mental condition of the witness. Besides, in the course of the trial, the answer was withdrawn from the jury. Other witnesses were asked questions relating to plaintiff's condition after she had heard of defendant's marriage, thus: "You may state to the jury how it affected her, or how it seemed to affect her." The court held the question was not incompetent, and the witness answered, "She didn't talk about the matter, only she was downhearted." It was

competent to show how, if at all, the defendant's marriage affected the plaintiff. Her wounded feelings, mortification, and pain, if any, resulting from defendant's breach of the contract, were all proper to be shown as elements of damage.

4. Error is assigned on the ruling of the court excluding evidence as to plaintiff's declarations made after the marriage contract was broken. We think there was no error in these rulings. The questions asked did not indicate that they related to expressions of plaintiff as to her feelings towards defendant before the breach of the contract. How she felt towards the defendant after he had deceived her, and put it out of his power to fulfill his contract with her, could in no way tend to show what her feelings towards him were while the engagement lasted. It was not proposed to show that these declarations, though made after defendant's marriage, related to her feelings towards or affection for him during the time the engagement subsisted. Moreover, the objection that the matter inquired about was not proper cross-examination was well grounded.

5. A witness was asked what the plaintiff was doing in the way of getting ready to be married. "Do you know anything about Rosa making preparations for marriage?" These questions were objected to as assuming a fact not proven, and the objection was overruled, and the witness answered: "Yes, sir; piecing quilts, and doing fancy work." Prior to the examination of this witness, testimony had been introduced, without objection, which showed these and other preparations for marriage. Indeed, there appears to be no conflict in the evidence touching preparations on part of plaintiff for a marriage. In that respect, and in view of the undisputed evidence in the case, the ruling was correct. But defendant urges that the questions assumed the existence of the contract of marriage, and cites *Jones v. Layman*, (Ind. Sup.) 24 N. E. Rep. 363. The question in that case was: "What declaration, if any, did she make in regard to her disappointment, and refusal of defendant to marry, at the time she showed you the letter?" It will be observed that the entire inquiry was based upon the thought expressed in the question, that defendant had refused to marry the plaintiff. Again, the question related to a declaration made by plaintiff in the absence of defendant, after the engagement had been broken. The court held the question objectionable for the latter reason, as well as because it assumed a breach of the contract. In the case at bar the evidence called for and elicited related to preparations which plaintiff was making for a marriage during the continuance of the engagement. Evidence of the conduct of the plaintiff, if it relates to the time covered by the engagement, or to a time when first informed of the fact that her intended husband has married another, is admissible to prove her consent to the alleged

marriage and contract. We do not think the questions, as asked, were objectionable.

6. A brother of plaintiff who had testified on direct examination that, while the defendant was keeping company with his sister, no one else was going with her, was asked: "Did you not, then, at that house on your father's farm, tell Mr. Craver, the defendant in this case, that your sister (plaintiff) had made a mash on Shadley there, at John Stilwell's?" An objection to the question was sustained on the ground that it was incompetent, immaterial, and irrelevant. The evident drift of this question was to show that the witness had made statements to defendant inconsistent with his testimony on direct examination. The question was clearly proper. What the answer would have been, of course, we cannot say; but it was proper for defendant to show if he could, on the cross-examination, that he was mistaken in his statements made in his examination in chief. The ruling of the court placed an undue restriction on the right of cross-examination.

7. On cross-examination a witness testified that plaintiff had kept company with one Mackey a short time before she began going with defendant. The court, on motion of plaintiff, struck out this evidence as immaterial and irrelevant. This action is assigned as error. We think the ruling was right. Defendant's claim seems to be that the conduct of plaintiff in receiving the attention of young men prior to the time the defendant began keeping company with her is material to the question of damages. Counsel say: "The ease with which the affections became enlisted, the readiness with which she laid down the old to take up the new, and like matters, were proper subjects to be considered, if the amount of damages to be allowed ever becomes important." If such evidence, relating to a time anterior to that when defendant began to seek plaintiff's society, is ever admissible, surely it is not under the circumstances developed in this examination. There was no evidence that the relations existing between plaintiff and Mackey were other than those usually incident to mere friendly association. It does not appear that it was a case of love at first sight, or otherwise. Their intercourse, so far as appears, was not different from that which exists in all cases of friendship between persons of the opposite sex who do not contemplate marriage. To show such friendly association between plaintiff and other men at a time prior to defendant's seeking her society is not material to any question involved in the case.

8. On cross-examination, defendant was asked several questions in relation to his property. All of them were objected to as not being proper cross-examination. The objections should have been sustained. Nothing was asked him on direct examination relating to his property. The questions were foreign to the examination in chief.

9. Complaint is made that the court ad-

mitted certain evidence in rebuttal which was a part of plaintiff's case in chief. As there was no ruling, we must presume that the objection was waived.

10. Witness Linn Craver testified with reference to having had a conversation with plaintiff after defendant's marriage. He was asked: "Now you may state whether or not, in that conversation, she said anything in regard to whether she had cared for your brother; that all she wanted was his money." Ollie Craver also testified to a similar conversation. She was asked the following questions: "You may state whether or not, in that conversation, she did or did not say she had never cared anything for the defendant, but all she was after was his money?"

"I will ask you whether or not Rosa Robinson did or did not say, in this conversation, that she did not care if he was married?" "What did she say was her feeling towards the defendant?" These questions were all objected to as incompetent and immaterial, and one of them was also objected to as leading. The objections were sustained. The ruling was proper as to the last two questions. Evidence of the plaintiff's statements or declarations, made soon after hearing of the defendant's marriage, and relating thereto, and expressive of her feelings towards the defendant, as they existed during the term of the engagement and before it is terminated, is admissible when it tends to show such feelings as are "inconsistent with any purpose to fulfill the engagement in a spirit befitting the relation contemplated by it." One possessed of such feelings would suffer little or no injury by reason of the breach of the contract. But evidence tending to show the feeling of the plaintiff towards the defendant after the breach of the contract, and relating only to that time, is never admissible. *Miller v. Hayes*, 34 Iowa, 496; *Miller v. Rosier*, 31 Mich. 475. A declaration of a woman who claims to have had an engagement of marriage, whether made during the existence of the engagement, or after she learns of its breach, that she had not cared for affianced; that all she wanted was his money,—certainly has a tendency to show that her object in seeking the engagement was of a mercenary character; that that love and affection so necessary to the enjoyment of the married state were wholly wanting; and that an engagement consummated under such circumstances would be unprofitable, unendurable, and full of contention and sorrow. The first two questions clearly refer to the feeling plaintiff had for the defendant before his marriage. Whether she "had cared" or "had never cared" for the defendant calls for the condition of her feelings towards him as they existed when she had reason to believe that the marriage would in due time be consummated. The last two questions may be said to relate to her feelings as they were at the time she made the statements, if any, and hence were properly excluded.

11. Error is assigned on the giving of an instruction to the effect that, if the jury found that the parties had entered into a marriage contract, the admission by the defendant of his marriage to another woman would constitute a breach of it, and plaintiff would be entitled to recover. It is said that there was evidence tending to show that the engagement had been broken, and that the instruction assumed that the evidence failed to establish that fact. There was no issue under which it would have been proper to submit to the jury the question of the abandonment of the contract. It was averred by plaintiff that a marriage contract was made, and it was denied by the defendant. Defendant rested his whole case upon the fact that no contract of marriage ever existed. The case was tried by the defendant upon that theory. Furthermore, the letter which is claimed shows the abandonment did not reach defendant until after his marriage. The instruction, under the issues, was correct.

12. Exception is also taken to an instruction of the court wherein he told the jury

that in assessing damages they might consider, among other things, "personal pain" suffered by plaintiff by reason of the breach of the contract. It is insisted that "personal pain" means physical suffering, instead of mental distress or mental suffering, and it is said the question of "personal pain" was not in issue. The petition avers "that the plaintiff has been, by the defendant, made to suffer great grief, shame, and mortification, and her affections have been greatly wounded," etc. This court has said that in this class of cases "the distinction between injury to the feelings and affections and personal pain and mortification for disappointment is too shadowy to receive practical recognition." *Royal v. Smith*, 40 Iowa, 618. Webster defines pain as "mental distress; anxiety; grief; anguish." It may well be said that the pain would be "personal," as much so as if it was purely physical. The instruction is unobjectionable.

The many other errors assigned we find to be without merit. For the reasons given, the judgment of the district court is reversed.

COMMONWEALTH v. CHANEY.

(18 N. E. 572, 148 Mass. 8.)

Supreme Judicial Court of Massachusetts.
Essex. Nov. 27, 1888.

Exceptions from superior court, Essex county; John W. Bacon, Judge.

Complaint against John Chaney for maintaining, in Gloucester, a building used for the illegal sale or keeping of intoxicating liquors. A witness for the government (Burns) testified that he never had bought cider to be drank upon the premises, and that he never had bought any cider and drank the same upon the premises; and he was then asked, subject to defendant's exception, "whether he had ever drank cider upon the premises," and "how often he got cider upon the premises." Boyle, another witness, called by the government, testified that he never had bought and drank cider upon the premises; and the court thereupon, against defendant's objection, allowed the witness to be asked "how often he drank cider upon said premises," and "how often he paid for cider which he got there, and which he said he carried away." The witnesses were unwilling ones, and the questions were asked by the district attorney as on cross-examination. The jury returned a verdict of guilty, and defendant excepted.

F. L. Evans, for defendant. A. J. Waterman, Atty. Gen., and H. A. Wyman, Second Asst. Atty. Gen., for the Commonwealth.

FIELD, J. One issue of fact was whether the defendant sold in his tenement, during the time alleged in the complaint, cider or native wine, "to be drunk on the premises." Pub. St. c. 100, §§ 1, 27. Evidence that cider and wine were drunk on the premises, by various persons, during this time, was competent, in connection with evidence that cider and wine were sold there during the same time, although the occasions were different. The evidence, taken together, had some tendency to prove that the tenement was used both for selling and for drinking intoxicating liquor, and the whole evidence may have been sufficient to warrant the jury in finding that some of the liquor drank on the premises had been sold there by the defendant. The answers given to the questions put to Burns and Boyle do not appear in the exceptions, and therefore it does not appear that the defendant has been prejudiced by the admission of the evidence, even if the questions should have been excluded. The questions were competent in substance, as they called for testimony relating to the drinking or the obtaining of cider upon the premises, presumably during the time alleged. The court could permit the attorney for the commonwealth to put leading questions to these witnesses. The objection does not appear to have been taken that the questions assumed facts of which there was no evidence, and apparently the exceptions were not drawn for the purpose of presenting this objection. Exceptions overruled.

CURTIS v. BRADLEY.

(31 Atl. 591, 65 Conn. 99.)

Supreme Court of Errors of Connecticut. Oct. 4, 1894.

Case reserved from superior court, Fairfield county.

Action by Lewis F. Curtis against Frederick H. Bradley to recover for moneys advanced by plaintiff to defendant for labor and materials used in the construction of defendant's building. Judgment for plaintiff, and motion for a new trial by defendant. Motion denied.

J. C. Chamberlain and Elbert O. Hull, for appellant. Allan W. Paige and George P. Carroll, for appellee.

HAMERSLEY, J. In the summer of 1890 the plaintiff sold the defendant a building lot. In September of that year the defendant decided to have a house erected on the lot. It was then understood that one Simeon E. Plumb, a builder, should build the house, and that the plaintiff, a merchant, should advance the money for the cost of construction. The decision of this case depended on the actual terms of the agreement then made, the defendant subsequently claiming that his only agreement was with the plaintiff, and that by such agreement the plaintiff undertook to have the house built for the agreed price of \$1,700. Plumb built the house under the directions of the defendant. The plaintiff paid to Plumb the amount of all bills for labor and materials as they came due. The house was finished in March, 1891, and the defendant accepted and occupied it. At the time the house was completed, Plumb and the plaintiff went over the labor and other bills, and the account of money paid for the cost of construction as charged on the plaintiff's ledger, and at the foot of that account Plumb wrote the following: "I have examined the above account, and find it correct. S. Plumb." The 14th of the same month, the plaintiff made a copy of this ledger account, and gave it to the defendant as the bill due from him to the plaintiff, in pursuance of their agreement. The defendant examined the bill, obtained the labor and material bills, made inquiries among the men who furnished materials whether the prices of the materials were correct, and found that they were correct. The defendant made no objection to the bill rendered as regards amount or price, except the claim that one item of 32 cents was charged twice; but the defendant did object to the total amount of the bill, and refused payment. Subsequently Plumb, as an original contractor, placed a mechanic's lien on the land upon which the house stood, to enforce payment for its construction, and brought an action against the defendant for the foreclosure of said lien. The plaintiff then brought an action against Plumb to recover the money paid for the cost of the house, and garnished the defendant as the

debtor of Plumb. Subsequently, 'Plumb assigned to the plaintiff his interest in said mechanic's lien, and in the sum due from the defendant to Plumb for the construction of the house; and the plaintiff then withdrew his action against Plumb, and became substituted as party plaintiff in the action to foreclose said lien. The action of foreclosure was tried, and in December, 1892, judgment was rendered in favor of Bradley, the present defendant. By the record of the judgment, it appeared that the court found that the lien had been made and recorded, and had been assigned to the plaintiff, who became sole owner, and was the actual and bona fide holder and owner of the chose in action; but that the contract for the building of the house had not been made with Simeon Plumb, as alleged in the complaint; and that neither he nor the plaintiff, as his assignee, was entitled to foreclose the same. After this judgment was rendered, the plaintiff brought the present action.

The complaint follows the form called the "common counts," authorized for the commencement of an action. The counts relied on are those for money paid, goods sold and delivered, goods bargained and sold, and work performed and materials furnished, under which counts a bill of particulars was filed, detailing each item that the plaintiff claimed entered into the cost of the house, and also the count for money due on account stated, under which count the bill rendered the defendant in March, 1891, was filed as the bill of particulars. The answer is a general denial. Upon the trial there appears to have been no contest as to the fact that the plaintiff had paid for the construction of the house, and no serious contest as to the accuracy of his account as rendered. The claim of the defendant appears to have been in the alternative,—either the defendant's contract was made with the plaintiff for a fixed price, or the contract was made only with Plumb, and therefore the plaintiff has no cause of action against the defendant; the position of the defendant under the latter claim, which was the one mainly relied on in argument, being that, having induced the court in the former action to hold that the contract was not with Plumb, he had escaped all liability on that ground, and, if he now induced the court to hold that the contract was made with Plumb, he would escape all liability whatever, and secure his house without any payment, obtaining judicial sanction for the practical theft, under two contradictory judgments. So far as the record shows, the main question at issue was: What agreement, if any, had the defendant made with the plaintiff? It was not claimed on the trial that any question of law was involved in the determination of this issue, and the court found from the evidence that there was an agreement between the plaintiff, Plumb, and the defendant "that Plumb should per-

form work in erecting a house for the defendant on this lot. Plumb, as carpenter, was to work by the day, under the defendant's directions, at twenty-five cents an hour, and was to employ other carpenters at the same rate. He was also to order materials and work other than carpenter work for the house, and have the bills for the same charged to the plaintiff. The plaintiff, at the request of the defendant, agreed to be responsible and liable for all such materials and other work as Plumb should order for the house, and advance the money for the payment of them, and also to advance money to Plumb from time to time as he might require to meet his weekly pay rolls. The defendant agreed that on the completion of the house, in consideration of the money thus to be advanced by the plaintiff for the building of said house, and in consideration of the building of the same, he would repay the plaintiff the total amount of the moneys so paid out by the plaintiff." Upon these facts, the court rendered judgment that the plaintiff recover of the defendant the sum of \$2,974.51, such sum being, as the court found, the total amount paid by the plaintiff in pursuance of that agreement, with interest. From this judgment the defendant appeals.

The appeal contains two distinct grounds for an appeal from the judgment:

1. Because the evidence introduced on the trial, and printed in the record, does not support the facts found by the court below, but does support a different state of facts claimed by the defendant, and which the court below found were not proved by the evidence. The law does not authorize an appeal from the judgment of a trial court for such reasons, and this court will not take jurisdiction of such appeal. *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165. The record discloses no reason for the correction of the appeal on the ground that the finding of facts does not fairly present the questions of law actually raised and decided.

2. Because the defendant is entitled to a new trial on account of errors alleged to have been made in the admission of evidence. Under this ground of appeal four errors are assigned:

First. The plaintiff offered in evidence certain slips of paper, testifying that Plumb came to the store each Saturday during the building of the house, and gave him the names of the men employed by him during the week, and their time; that the plaintiff wrote down at the time, in the presence of Plumb, on these slips, these names, the hours of time, the amount due each man, the total amount due, and the date; that he paid Plumb the total amount of money called for by each slip, and filed the slip on a spindle; and that he had no personal knowledge of the facts so stated to him by Plumb, and so written by him on the slips, but that he made such memoranda correctly as Plumb then

stated the facts to be. Plumb had already testified that he had employed these men on the Bradley house, and that the slips of paper were correct statements of the facts of each case as far as he could recollect; that he knew them to be correct when made; and that he had given the names, hours of time, and the amounts to the plaintiff, in the manner that the plaintiff subsequently testified; and that, after deducting his own wages, he paid each man the amount due him. This evidence was offered to prove that the plaintiff had incurred liabilities and paid out moneys upon the order of and as required by Plumb, as agent for the defendant, in the manner agreed upon by the parties, and to prove the correctness of the items and prices. The defendant objected to the introduction of these slips, and to the testimony of the plaintiff and of Plumb as shown. The court admitted the slips, not as themselves evidence apart from the oral testimony, but as memoranda made at the time and in the manner shown, and to be used by the witnesses Plumb and Curtis in the manner indicated, the witnesses reading the contents of the slips, and admitted the testimony of Curtis and Plumb in connection with them as stated. Said slips were marked as exhibits.

Second. The plaintiff offered in evidence certain bills, testifying that they were rendered him from time to time, and that he went over the bills with Plumb, in the defendant's absence, at various times as they came due, while the house was building or upon its completion; that some of these bills were exclusively for materials and work for the defendant Bradley's house, and some contained other items not for that house, and Plumb picked out the items of material and work that went into the Bradley house, and stated that the items and prices were correct; that when the designation "Bradley house" was not in the body of the bill when rendered, as it was in many bills, he (the plaintiff) wrote it in at the time in Plumb's presence, and correctly as given to him, and that he also made the check marks appearing on the bills when offered in evidence, to indicate Plumb's assent to the correctness of the items and prices; that these check marks were made in Plumb's presence, and correctly, as then stated by him to the plaintiff; and that he could not recall those items or prices without referring to the bills and memoranda made on them at the time. Plumb had already testified that he had given the orders to the persons thus rendering bills to the plaintiff, and that he had gone over these bills in the manner that the plaintiff testified, and that he had stated to the plaintiff that the items and prices as picked out were correct, and that these items represented materials and labor that had gone into the house, and that he had no recollection of the details of those items independently of the bills and the memoranda upon them, which

he had seen at the time, and which he then knew to be correct. This evidence was offered to prove that the plaintiff had incurred liabilities and paid out money as required and ordered by Plumb as agent for the defendant, in the manner agreed by the parties, the correctness of the items and prices, and that the materials went into the Bradley house. The defendant objected to the introduction of the bills, and to the testimony of the plaintiff and of Plumb as above set forth. The court did not admit the bills, marked and designated as stated, as themselves evidence apart from the oral testimony, but admitted them as memoranda made or seen by witnesses who at the time either had knowledge of their truth or made them upon the statements of one who had such knowledge at the time, and to be used by witnesses in the manner shown, the witnesses reading their contents as marked, and their value depending upon the oral testimony accompanying them, and admitted the testimony of the plaintiff and Plumb as stated above.

There is no error in the above rulings. The court found that Plumb was authorized by the defendant to perform and to employ the labor on the house, and present his weekly pay rolls to the plaintiff; also, to order other work and materials for the house, and present the bills for such materials and work to the plaintiff; that the plaintiff was authorized by the defendant to pay to Plumb such weekly pay rolls, and to pay such bills for materials and work so ordered by Plumb, and charge the amounts of the pay rolls and bills so paid by him against the defendant. The court was bound to admit the testimony of the plaintiff and of Plumb as to the liabilities incurred and the payments made under such authority. The use of the slips and bills made at the time of the transaction, and known to the witnesses to have been correctly made, as memoranda to be used by them in connection with their oral testimony, comes within the settled rules of evidence. "A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if, when he read it, he knew it to be correct." Steph. Dig. Ev. art. 136. "How far papers not evidence per se, but proved to have been true statements of fact at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has many times been decided that they are to be received. And why should they not be? Quantities and values are retained in the memory with great difficulty. If, at a time when an entry of aggregate

quantities or values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as the memory of the witness." *Insurance Co. v. Weide*, 14 Wall. 380; *Town of Bridgewater v. Town of Roxbury*, 54 Conn. 213, 6 Atl. 415.

The defendant also claims error in marking the slips as exhibits, on the ground that, if they might properly be read by the witness, they are not themselves admissible as evidence. Courts in other jurisdictions have made different rulings as to the admissibility of such a writing. In England it is excluded. In Massachusetts and some other states it is excluded. *Costello v. Crowell*, 133 Mass. 355; *Morrison v. Chapin*, 97 Mass. 72; *Duggan v. Mahoney*, 11 Allen, 572. In Vermont it seems to be treated as evidence. *Lapham v. Kelly*, 35 Vt. 195. In New York and some other states the writing is admitted as evidence. *Guy v. Mead*, 22 N. Y. 462, 465; *Mayor, etc., v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905; *Haven v. Wendell*, 11 N. H. 112; *Kelsea v. Fletcher*, 48 N. H. 282; *State v. Rawls*, 2 Nott & McC. 331; *Pearson v. Wightman*, 1 Const. (S. C.) 336; *Owens v. State*, 67 Md. 307, 10 Atl. 210, 302; *Milling Co. v. Walsh* (Mo. Sup.) 18 S. W. 905. In the federal jurisdiction the question is still open. In *Insurance Co. v. Weide*, supra, the court indicates the admissibility of the evidence; but the opinion in *Bates v. Preble*, 151 U. S. 155, 14 Sup. Ct. 277, shows that the court is not committed to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness. We do not attempt to cite all the cases bearing on the question, or to weigh the conflicting authorities; for we are satisfied, on principle, that the evidence in question is admissible. The discussion would be endless, unless confined to the precise question presented, which may be stated as follows: The litigated question is, did the plaintiff pay to the agent of the defendant a certain sum on a certain date, as wages due for labor performed by a certain man employed by the agent? The plaintiff and the agent testify that a sum was paid for such purpose; that at the time of payment the agent gave to the plaintiff the exact amount due, and the name of the employé entitled to the same, and the plaintiff then, in the presence of the agent, wrote on a piece of paper the date, the amount, and the name; that these items, as then written by the plaintiff, were correct; that the paper produced in court is the identical paper then written upon by the plaintiff, and since unchanged; that they have no recollection, either before or after examining the paper, of the date, the amount, or the name. Is that paper admissible as evidence? All courts concur in holding that the witness may read the statement of such paper to the jury, and that the jury may draw the conclusion that the statement so read to them is a true statement of the facts; but some courts hold that the paper is not evidence.

It seems to us to be pressing the use of a legal fiction too far for a court to permit the statement made by such paper to be read as evidence, while holding that the law forbids the admission as evidence of the paper which is the original and only proof of the statement admitted. In other words, it would seem as if, in admitting the paper to be so read, the court, of necessity, admitted the paper as evidence, and therefore, by the concurrent authority of all courts, the paper is itself admissible. But, waiving the question whether, in admitting such paper to be read, the courts have gone so far as to make the denial of its admissibility no longer tenable, we will deal with the matter as if wholly undecided. Is the paper itself admissible as evidence? Its admissibility, in the first instance, depends on its relevancy. Of this there can be no doubt. Being relevant, it must be admitted, unless excluded under some legal principle or rule of public policy which forbids the admission of certain classes of evidence, no matter how relevant and material. It cannot be said that the paper is not capable in its nature of being treated as competent evidence. Legal evidence is not confined to the human voice or oral testimony; it includes every tangible object capable of making a truthful statement, such evidence being roughly classified as documentary evidence. In oral evidence the witness is the man who speaks; in documentary evidence the witness is the thing that speaks. In either case the witness must be competent, —i. e. must be deemed competent to make a truthful statement. And in either case the competency of the witness must be proved before the evidence is admitted; the difference being that in oral evidence the competency is proved by a legal presumption, and in documentary evidence the competency must be proved by actual testimony, and the further difference that in oral evidence the credit of the witness is tested by his own cross-examination, while in documentary evidence the credit of the witness is tested by the cross-examination of those who must be called to prove its competency.

The competency of this paper is clearly established by the testimony, and it would seem to follow, of necessity, that it should be admitted on the same ground that any relevant and material documentary evidence, proved to be competent, is admitted. The doubt has arisen from the complication of the admissibility of such paper with the right of a witness to refresh his memory. In fact, the two questions may be entirely distinct. The right of a witness to refresh his memory is a settled and necessary rule of evidence. The application of that rule is often difficult, involving delicate distinctions. We are not called upon now to draw the line which limits the right of a witness to the use of such aids as, under the subtle laws of association, serve to refresh his memory. All courts recognize that right, and right-

ly hold that the thing used to refresh the memory is not, by reason of such use, itself admissible as evidence. When, in the application of the rule, a document like the one in question was presented to the witness, and absolutely failed to refresh his memory, its exclusion as a means of refreshing his memory became imperative; but the evidence of the document was so clearly essential to a fair and just trial that its use in some form seemed also imperative. Instead of treating the paper as itself competent documentary evidence, resort was had to a palpable fiction. The paper is read by the witness, and the knowledge the witness once had of the facts stated by the paper is imputed to him as still existing, and the statement of the paper is received as the testimony of the witness, and the paper itself, the only witness capable of making the statement, is excluded. The use of such a fiction in the administration of justice can rarely, if ever, be justified. It is certainly uncalled for in this instance. The principles of law invoked to justify the fiction are amply sufficient to support, indeed to demand, the admission of the document as evidence. There is no occasion to sacrifice truth in order to secure justice. As regards its admissibility as evidence, there is no substantial difference between this paper and any other tangible object capable of making a truthful and relevant statement. It is true that a writing may be a mere declaration, and practically equivalent to a spoken declaration, and so be excluded as hearsay evidence. This possibility has played a conspicuous part in the discussions that have finally resulted in the admission as evidence of account books, whether kept by a clerk or by a party to the suit (a subject closely related to the one in hand, but involving too large a field to justify an attempt to define that relation). But it is also true that a writing may, by reason of the circumstances under which it was made, be a documentary witness to the fact the paper itself tends to prove, and this, although the particular writing may also in a certain sense be a declaration. Indeed, nearly all documentary evidence is in a certain sense a declaration; yet it is admitted as a witness, not of a declaration, but of a fact. We think this paper is admissible as a documentary witness. Suppose the litigated question turns on the dimensions of a man's foot. A witness produces a plaster cast of the foot. The testimony conclusively shows that the cast was so taken that it can state accurately the dimensions of the foot. Another witness produces a paper on which the exact measurements are written. The testimony conclusively shows that the paper also was so made that it can state accurately the dimensions of the foot. Is it not evident that the paper and the cast is each a witness to the fact that each tends to prove? How does the paper now in question differ? Upon this

paper was stamped an accurate delineation of existing facts. In the one case the fact stated by the document relates to a physical object, and in the other to a mental object; but in both cases the fact is clearly relevant and accurately stated by the document. It is immaterial whether or not a critical analysis may impute to these documents, to a greater or less degree, some element of a declaration; the controlling principle of law is not based on such refinements. If there is any element of a declaration, it does not make the document in a legal sense a declaration. The conditions required by law to make such documents legal evidence are: The substance offered as a witness must be proved to have been made or found and preserved in such manner that it states directly, accurately, and truly a fact relevant and material to the issue. The paper claimed as evidence in this case fulfills these conditions.

In the discussions on the admissibility of account books, it has often been assumed that such books are declarations, and are admitted as exceptions to the class of hearsay evidence. Without stopping to consider whether such ground for the admission of account books is logically accurate, and, if so, whether the same reasoning applies to this paper, we will assume that it may be classed as hearsay evidence. It should then be admitted as an exception to the rule excluding such evidence. The limits of the field covered by the term "hearsay evidence" are so uncertain, and the exceptions are so many and important, that it is often very difficult to draw the distinction between those matters that are admitted as not subject to the rule and those that are subject to the rule, but excepted from its operation. It is significant that most matters supposed to be covered by the rule, whose relevancy and materiality come to be recognized as so close and clear that their admission seems essential, come to be classed as exceptions to the rule. If this paper must be classed as a declaration and hearsay evidence, it must also be classed as an exception to the operation of the rule. The reasons on which the rule is founded plainly do not apply to such evidence, and the arguments adduced in support of the admissibility of this paper as original evidence are sufficient to demonstrate that it does not come within the reason of the rule excluding hearsay evidence. Whether this paper is not within the scope of hearsay evidence or, being hearsay evidence, is excepted from the operation of the rule, as not within its reason, is immaterial so far as concerns the question of admissibility, though the distinction may be quite material as affecting the symmetry of the law of evidence, and the clear understanding of the underlying principles that must control the development of that law. It does not, however, necessarily follow from the admissibility of such evi-

dence that the document should be sent to the jury room. Under the general rule of practice, the jury must depend on their memory in the case of oral testimony, but may take documentary evidence to their consultation. But there is a difference in documentary evidence. Some is not given to the jury, either because its possession is agreed to be of no consequence or is inconvenient, or the document is of such a nature that it testifies to facts not relevant, in addition to the relevant facts. It might be claimed in the case of some writings offered in proof of the facts stated by the writing that a jury would confuse the effect to be given such writing with the peculiar effect sometimes given to a record or a deed, and so give an illegal weight to the evidence. Possibly, some such consideration may have had influence in keeping such writings from the jury; but, whatever force such a consideration may once have had, it is entitled to little weight under the present policy of the law, which tends to submit to the jury all relevant and material evidence, and even trusts them to discriminate the allowance to be made for the interest of a party to the suit, or the character of a convicted felon. If the writing admitted in evidence clearly tends to prove nothing but the fact that it was admitted to prove, it should go to the jury. If, by reason of peculiar circumstances, it clearly may be treated by the jury as evidence of other facts not admissible, it should not go to the jury. Between the two extremes the question is largely one of discretion in the trial judge.

In the present case it is clear that the writing could only be used for its legitimate purpose, and that the court did not err in marking it as an exhibit. The conditions under which the general question we have discussed may arise are so various, and the different principles that may be involved in each case are so related, that there is special need to confine the application of the views expressed strictly to the particular question presented in this case. The only point now decided is: A memorandum of details which are essential to the full proof of a transaction at issue, proved to have been made substantially at the time of the transaction, and under such circumstances that the memorandum can make a correct statement of such details as they were then known to the person who made the memorandum or saw it made, and who is himself a witness and testifies to the transaction, but has lost all recollection of such details, is, in connection with the testimony of such witness, admissible as evidence, because such memorandum is in itself evidence of a fact closely relevant, plainly material, and essential to a just trial, and because no principle of the law of evidence or rule of public policy justifies its exclusion; and such memorandum may properly be marked as an exhibit.

Third. The persons rendering the bills

above mentioned testified that the bills as a whole were correct as regards amounts and prices, and that, when the body of the original bill indicated what items went to the Bradley house, those items of material and labor were ordered for that house by Plumb. The defendant excepted to the admission of the testimony of these persons. The error assigned by the defendant is that the court erred in allowing the evidence of the parties furnishing this material, to the effect "that, where the body of the original bill indicated what item went to the Bradley house, these items of materials and labor were ordered for that house by Plumb." The fact that the money paid by the plaintiff was paid for materials used in building the house, and ordered for that purpose by Plumb, as the agent of the defendant, was a fact in issue; and the testimony of the persons from whom it was claimed that Plumb had so ordered such materials, that he had in fact ordered the same, was relevant to that issue. The use by such witnesses in their testimony of the bills made by them at the time, in pursuance of such orders from Plumb, and of the written memoranda made by them at the time to the effect that Plumb, the agent of the defendant, ordered the materials specified for the defendant's house, is plainly authorized by law.

Fourth. The plaintiff offered the record of

the judgment above mentioned, in the case of Curtis, assignee of Plumb, against Bradley, for the purpose of showing that in this case the defendant was estopped from claiming that the contract for the erection of the house was made with Plumb. The court admitted the record against the objection of the defendant. The fact that the contract for the construction of the house was not made with Plumb was one material fact at issue in this case, and the plaintiff was entitled to show that the defendant was estopped from claiming that the contract was made with Plumb. It is not claimed that the record of a judgment in a case between the same parties, which appears on its face to have adjudicated a matter in issue between them in a subsequent action, is not admissible in the latter suit in support of a claim of estoppel; but the claim is that in this case the parties to the record offered were not the same as the parties to the present suit. This claim has no foundation in fact. The plaintiff in this suit was the actual plaintiff in the former action, and, moreover, was substituted for the nominal plaintiff, and by such substitution became also the plaintiff of record. Gen. St. §§ 981, 987-989; Buckingham's Appeal, 60 Conn. 143, 22 Atl. 509.

A new trial is denied. The other judges concurred.

BOHAN v. BOROUGH OF AVOCA.

(26 Atl. 604, 154 Pa. St. 404.)

Supreme Court of Pennsylvania. May 1, 1893.

Appeal from court of common pleas, Luzerne county; Rice, Judge.

Action in trespass by Paul Bohan against the borough of Avoca for damages to plaintiff's lot resulting from the construction of gutters along defendant's street, and thus conducting the surface water from a large territory to the lot. Plaintiff had judgment, and defendant appeals. Affirmed.

The Points Which were Submitted in Writing to the Court Below, and the Answers Thereto.

"The plaintiff asked the court to charge the jury as follows: '(1) If the jury believe that the defendant borough, in constructing its gutters, caused the surface water of a large territory, which did not naturally flow in that direction, to be gathered into a body, and precipitated on plaintiff's premises, to the injury of the plaintiff, defendant is liable, and plaintiff is entitled to recover.' We answer that point in the affirmative.

"Defendant's counsel request us to charge:

"'(1) That no recovery can be had in this case unless the jury are convinced by the testimony presented that the quantity of water flowing down Main street through the culvert upon the property of the plaintiff has been increased, and that such increase has given to it a greater force of destructiveness, and that in consequence of the same the plaintiff's property has been injured.' This point is affirmed.

"'(2) That, if the increase in the volume and destructiveness of said water is due to the change of the grade of the street, and not to the construction of the gutters, the plaintiff is not entitled to recover.' This point is affirmed.

"'(3) That in determining whether or not there has been any increase in the volume of water since the construction of the gutters, it is the duty of the jury to make comparison upon the theory that the street and its gutters were kept in proper order, and unobstructed, before the paved gutters were constructed.' As explained by the counsel in his argument to us, we affirm that point. What we understand is meant by this is that a comparison is to be made between the flow of water in the present condition of the gutter with the flow of water ordinarily, prior to the placing of the gutters there. In other words, the comparison is not to be made between the present flow of water in the gutter and through the culverts, with the flow of water when the street or water courses, prior to the placing of the gutters there, were temporarily obstructed.

"'(4) The allegation in this case being that the alleged injury to the property of plaintiff was caused by paved gutters constructed by the borough, plaintiff was bound to prove

that said gutters were constructed pursuant to legislation on part of said borough, and, there being no legitimate proof presented to establish any such legislation, the plaintiff is not entitled to recover.' We decline to charge as requested in that point. We think there is evidence from which a jury would be warranted in finding that the gutters were constructed by the borough.

"'(5) That the plaintiff cannot recover any damages for any injury to his property which he might have avoided by the exercise of ordinary care, either in respect to the past or to the future.' This is affirmed.

"'(6) That the jury, if they find that the defendant is liable in this action, may adopt as the measure of damages the expense of protecting the property with a wall or pipe from injury on account of the water flowing through the ravine.' This is affirmed."

Specifications of Error.

"First. The court erred in overruling the defendant's objection to questions of plaintiff's counsel on the cross-examination of defendant's witness as to who authorized the work of constructing the gutters,—a fact not alluded to in chief, and provable by the record of council proceedings alone,—which said ruling, testimony, and questions are as follows: 'Question. Done by the borough while you were burgess? A. No, sir. (Objected to. Objection overruled.) Defendant's counsel states the objection as follows: (1) Because it is not cross-examination. (2) It is a part of plaintiff's case in chief, and can be proved only by the records of the council, whether it was done by the borough or not. (Objection overruled, and bill sealed for defendant.) Q. Do you swear that it was not done by the borough,—that the borough did not employ Mr. Westfield to do the work? A. It was done under the jurisdiction of the borough, but the people paid the money. Q. Who employed Mr. Westfield to do it? A. The town council.'

"Second. The court erred in refusing to affirm defendant's point number four, which reads as follows: 'Point 4. The allegation in this case being that the alleged injury to the property of plaintiff was caused by paved gutters constructed by the borough, plaintiff was bound to prove that said gutters were constructed pursuant to legislation on the part of said borough, and, there being no legitimate proof presented to establish any such legislation, the plaintiff is not entitled to recover. Answer of the Court: We decline to charge as requested in that point. We think there is evidence from which a jury would be warranted in finding that the gutters were constructed by the borough.'"

P. A. O'Boyle and F. M. Nichols, for appellant. C. F. Bohan and John T. Lenahan, for appellee.

STERRETT, C. J. One of the specifications in this case is refusal of the court to

sustain objections to questions put, on cross-examination of defendant's witness, for the purpose of showing that the gutters alleged to have caused the injury complained of were constructed by the defendant borough, or under its authority. The objections were (a) that the questions were not proper cross-examination, and (b) that the fact sought to be proved was part of plaintiff's case in chief, and could be proved only by the records of the borough council. The court having overruled said objections, the witness testified in substance that the work of constructing said gutters was done under the supervision of the borough authorities, and paid for by the property owners. In his examination in chief the witness was not asked, nor did he expressly say, by whom the grading and guttering in question were done, but he testified as to the physical nature of the street along which the gutters were made, the effect of their construction on plaintiff's property, etc.; and such was the general character and scope of his testimony in chief that it might be fairly inferred that the work was done by or under the direction of the municipal authorities. In view of the circumstances, we cannot say there was error in permitting the cross-examination complained of. While, as a general rule, it is improper to permit a defendant to interject his defense under guise of cross-examination of plaintiff's witness, and vice versa, the range of a cross-examination must, to a very great extent, be left to the sound discretion of the trial judge; and unless that discretion has been plainly abused, to the injury of the party complaining, it is not ground for reversal. In *Jackson v. Litch*, 62 Pa. St. 451, it was held that, in order to reverse for this cause, it must be an extreme case in which the discretion has been abused, and in which it is apparent the party has been injured; and also, where a witness has stated a fact, he may be asked by the other party to detail all the circumstances within his knowledge which qualify it, though they may be new matter and form part of his own case. As was said in *Bank v. Fordyce*, 9 Pa. St. 277: "A party is entitled to bring out every circumstance relating to a fact which an adverse witness is called to prove." In this case there was no abuse of the discretion with which the trial judge was invested; nor do we think the defend-

ant was prejudiced by the fact elicited on the cross-examination. An examination of plaintiff's testimony shows that fact was either recognized or assumed by witnesses as well as the parties. One of plaintiff's witnesses was asked if he remembered "when Main street was graded by the borough," and "when they paved the gutters along there," and his answer was, "Yes, sir." Even if the plaintiff had closed his case without introducing any testimony from which the jury would have been warranted in finding the fact, the court, in order to prevent a miscarriage of justice, would not have refused to permit the plaintiff to call witnesses out of order and prove it.

The only other specification of error is the refusal of the court to affirm defendant's fourth point for charge recited therein. In declining to charge as requested, the learned judge rightly held there was "evidence from which a jury would be warranted in finding that the gutters were constructed by the borough." The authority of the borough to do so was not, and could not have been, questioned. In view of the evidence, it was for the jury to say whether the proper borough authorities did or did not construct or superintend their construction, etc. It is well settled that the acts of a municipal corporation may be proved otherwise than by its records or some written document. *Dill. Mun. Corp. § 300*; *Bank v. Dandridge*, 12 Wheat. 64. In affirming plaintiff's first point, the learned judge rightly instructed the jury that, if they believed the "defendant borough, in constructing its gutters, caused the surface water of a large territory, which did not naturally flow in that direction, to be gathered into a body, and precipitated on plaintiff's premises, to the injury of the plaintiff, defendant is liable, and plaintiff is entitled to recover." The evidence tended to prove the facts of which this proposition is predicated, and by its affirmance plaintiff's case was fairly presented to the jury. On the other hand, by the affirmance of defendant's first, second, third, fifth, and sixth points, every necessary precaution was taken to properly indicate the limits within which the jury should act. An examination of the record discloses no error that would warrant us in disturbing the judgment. Judgment affirmed.

PHILLIPS et al. v. TOWN OF MARBLE-HEAD.

(19 N. E. 547, 148 Mass. 326.)

Supreme Judicial Court of Massachusetts.
Essex. Jan. 4, 1889.

Exceptions from superior court, Essex county; John Lathrop, Judge.

Petition by Emily A. Phillips and others for the assessment of damages for taking their land in the town of Marblehead for a street; the taking being alleged to have occurred March 6, 1886, and July 27, 1886. Mason, a witness for petitioners, who was about 45 years of age, and had always lived in that town, testified that he did not own real estate in the town, nor had he bought or sold real estate therein; that he had for several years advised his father, or, rather, his father, who had bought and sold real estate in the town, had advised him; that he had heard of a great many of the sales of real estate in the town in the last five or ten years, and at the time of such sales he heard of some of the prices paid; that he heard of the sale of the Gerry-Street lots, and other land near that of petitioners, and of similar character, and had heard of some of the prices, but could not now give the price at which any particular lot sold; that he had been a collector of taxes in said town, and had in one instance acted as an appraiser of real estate; that he was familiar with petitioners' land, having known it all his life; that he had heard of sales and prices of land upon Chestnut street, which extends north and south the entire length of the petitioners' land, and is about 100 feet distant therefrom, but could not tell of any particular sale; that he thought he had a judgment as to the fair market value of real estate in said town, and as to the fair market value of the land taken from the petitioners for said street, as aforesaid; and thereupon the petitioners asked him what, in his judgment, was the fair market value upon July 27, 1886, of the land taken from the petitioners for the laying out of the street. The court excluded the question, upon the ground that the witness was not qualified as an expert to express an opinion as to the market value of the land, remarking that "there must be better evidence to be had." Wyman, who owned a considerable tract of land known as the "Bessom Farm," adjoining the petitioners' tract, and of the same general character, testified to the value of the land taken from petitioners; and upon cross-examination testified that the Bessom farm, adjoining that of the petitioners, was worth \$2,000 or \$2,500 per acre. Thereupon respondents, against the petitioners' objection and exception, were allowed, solely as bearing upon the question of the bias or fairness of the witness, to place in his hands a written statement dated about June, 1886, and directed to the assessors, signed and sworn to by witness, and to ask him from that to say what in that he valued his said land ad-

joining that of petitioners; and he replied, "One hundred dollars per acre," and added that he so valued it, and it was so understood, for its agricultural purposes only. Respondents called as a witness one Martin, a member of the board of selectmen of the town in the year 1886. Martin, upon direct examination, testified that the petitioners' land, including that taken, was worth \$200 to \$300 per acre, and no more; and that the petitioners' remaining land was largely benefited by the laying out of the street. Upon cross-examination he testified that the petitioners had, in his judgment, sustained damage to the amount of \$300, and no more. Petitioners then offered in evidence, solely for the purpose of contradicting him, the record of the board of selectmen made July 27, 1886, showing the laying out of the street, and the damages therefor, signed by Martin, together with the remaining members of the board; which record contained the statement that petitioners had sustained damage by the taking of their land to the amount of \$553, and awarded to them that sum. The record was excluded, and petitioners excepted. Verdict for respondents, and petitioners filed exceptions.

F. L. Evans, for petitioners. W. D. Northend, for respondents.

FIELD, J. Whether a person who is offered as a witness is shown to be qualified to give an opinion upon the value of land must be left largely to the discretion of the presiding judge. We cannot say, upon the evidence recited in the exceptions, that Mason was not rightly excluded as a witness to value. The case shows that there was no difficulty in obtaining witnesses whose qualifications were unquestioned, and this fact was properly considered by the presiding judge in deciding to exclude him. *Tucker v. Railroad Co.*, 118 Mass. 548. It was also, we think, within the discretion of the presiding judge to admit the question which was put to Wyman by the respondents, on cross-examination, to which the petitioners objected. As Wyman's land was adjoining to and of the same general character as that of the petitioners, sales of it would be competent to prove the value of the petitioners' land, but the opinion of witnesses upon the value of Wyman's land would not be competent to prove the value of the petitioners' land. *Wyman v. Railroad Co.*, 13 Metc. (Mass.) 316, 327; *Shattuck v. Railroad Co.*, 6 Allen, 115. When, therefore, the respondents asked the witness Wyman his opinion of the value of his own land, the question might have been excluded. The inquiry was immaterial and irrelevant, except, perhaps, for the purpose of testing the weight of the opinion of the witness as to value. The question, however, having been answered without objection, the respondents could not have been permitted to contradict the

answer by the testimony of other witnesses, or by other evidence than the testimony of the witness himself. Immaterial or irrelevant issues cannot be raised and tried in this manner. *Shurtleff v. Parker*, 130 Mass. 293; *Fletcher v. Railroad Co.*, 1 Allen, 9. But the extent to which the cross-examination of a witness as to credit may be carried must be left largely to the judge presiding at the trial, and if matters which are merely immaterial, or which tend to show the reasons of the witness for his opinions or his fairness of mind, are admitted in cross-examination, there is, as a general rule, no exception. Considerable latitude should be allowed in cross-examining witnesses to value, in order that the grounds of their opinion may appear. *Prescott v. Ward*, 10 Allen, 203; *Smith v. Castles*, 1 Gray, 108.

The record of the board of selectmen, of whom Martin was one, was offered for the purpose of contradicting the testimony of Martin. The fact that the record or certificate was signed by Martin, as well as by the other selectmen, did not show that the amount of the damages awarded was the sum which Martin, acting on his own judgment, thought ought to have been awarded. Selectmen have no clerk, and their doings can only be certified by their own signatures, and the certificate purported to give, not the opinion of the selectmen individually, but the judgment of the board, which might be the judgment of a majority only of a quorum of the board. Besides, in every judicial or quasi judicial determination

of damages by a board composed of more than one person, there must be compromises of individual opinion, in order that any result may be reached; and a judicial body must give some weight to evidence, and cannot act solely upon the personal knowledge of its members, when evidence is produced before them. Either, then, the record should have been excluded, or, if admitted, Martin and the other selectmen should have been permitted to testify to the part taken, and to the opinions expressed by Martin in the deliberations of the selectmen which resulted in the award. While the deliberations of legislative bodies are usually public, the deliberations of judicial or quasi judicial bodies are private; and there are reasons of public policy why they should not be made public, particularly when the purpose to be served is comparatively unimportant. Grand and petit jurors are not permitted to testify to opinions concerning the case, expressed in their consultations with each other, and arbitrators are not permitted to testify to the grounds on which they reached the conclusions declared in the award. *Com. v. White*, 147 Mass. 76, 16 N. E. 707; *Woodward v. Leavitt*, 107 Mass. 453; *Bigelow v. Maynard*, 4 Cush. 317.

For the purpose of contradicting a witness, we think that evidence ought not to be received of the deliberations of selectmen acting in a quasi judicial capacity, and that the certificate of the doings of the board of selectmen was rightly excluded.

Exceptions overruled.

HOME BENEFIT ASS'N v. SARGENT.

(12 Sup. Ct. 332, 142 U. S. 691.)

Supreme Court of the United States. Jan. 26, 1892.

In error to the circuit court of the United States for the Southern district of New York.

Action by Henrietta P. Sargent against the Home Benefit Association on a policy of life insurance. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

A. G. Fox and Francis Lawton, for plaintiff in error. Miron Winslow, for defendant in error.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the circuit court of the United States for the Southern district of New York by Henrietta P. Sargent, a citizen of Massachusetts, against the Home Benefit Association, a life insurance association incorporated by the state of New York, to recover the sum of \$5,000, with interest from March 15, 1887, upon a policy of life insurance issued by the defendant September 5, 1885, on the life of Edward F. Hall, Jr., for the benefit of the plaintiff, who was his sister.

Hall was made by the policy an accepted member of the life department of the defendant. By one of the conditions in the policy it was provided that "death of the member by his own hand or act, whether voluntary or involuntary, sane or insane at the time," was a risk not assumed by the defendant under the policy.

The complaint alleged that the policy was in force on the 19th of October, 1886, when Hall died at the city of New York, and that his death was not caused by any of the causes excepted from the operation of the policy. It was set up in the answer as a defense that the death of Hall was brought about by his own hand and act, in that he died from the immediate effect of a shot from a pistol fired by his own hand, such shot having been fired by him with the intention of taking his own life.

The case was tried before Judge Coxe and a jury, which rendered a verdict for the plaintiff for \$5,350. A motion for a new trial was made before Judge Coxe, and was denied,—the opinion of the court thereon being reported in 35 Fed. 711,—and a judgment was thereafter rendered in favor of the plaintiff for \$5,350, with interest and costs; the whole amounting to \$5,517.99. To review that judgment the defendant has brought a writ of error.

By the bill of exceptions it appears that, after the plaintiff rested her case, the defendant moved the court to direct a verdict for it, on the ground that the plaintiff had failed to show that she ever had presented to it, in accordance with the provisions of

the policy, satisfactory evidence of Hall's death; but the court denied the motion. The defendant excepted, and then proceeded to put in evidence on its part. After it had rested, the plaintiff put in rebutting evidence on her part, and then the defendant put in further evidence. It is not stated in the bill of exceptions that it contains all the evidence; but it is set forth at the close of what does appear that the defendant moved the court to direct a verdict for the defendant, on the ground that the evidence showed that Hall died by his own hand. The court refused to do so, and the defendant excepted.

Parts of the charge of the court to the jury are set forth, and it is stated that the court charged the jury as to all other features of the case fully and in such manner that no exception was taken thereto, and that the portions of the court's charge to the jury which are not set forth did not in any wise bear on or relate to any matters contained in the defendant's requests to charge, hereinafter referred to.

Among the instructions of the court to the jury were the following: "The only question upon this proof is, did Edward F. Hall commit suicide? If he did, the policy is void. If he died in some other way—by accident or assassination—it would be otherwise. Upon that issue, the burden is upon the defendant to satisfy you by a fair preponderance or proof of the truth of this defense. * * * When the policy of insurance was introduced with evidence or admissions that the premiums had been paid, and proof was given of the death of the assured, the plaintiff, if no further evidence had been produced, would have been entitled to a verdict; but the defendant comes into court, and asserts that the contract under which the action is brought has not been fulfilled, but has been violated by the assured. Being an affirmative defense, the onus is upon the defendant to satisfy you by evidence which, in your judgment, outweighs the evidence of the plaintiff, that that defense has been established."

The court, after stating that the defendant had introduced in evidence proofs of death furnished to it by the plaintiff; that the defendant insisted that the plaintiff, having produced those proofs, was estopped from saying that the cause of death there assigned was not truly assigned; and that such proofs asserted generally that Hall met his death by suicide, while laboring under temporary aberration of mind,—also instructed the jury that such proofs were proper evidence for them to consider, but were by no means conclusive evidence, and were to be taken by them in connection with the other testimony in the case, and given such weight in determining the main question as the jury might see fit to give them.

The court further instructed the jury, that the plaintiff's position was—First, that the

burden being upon the defendant to satisfy them that Hall met death by his own hand, intending to kill himself, the plaintiff had a right to rely upon the alleged failure of the defendant to prove that fact; second, that it was asserted by the plaintiff that Hall's death might have been occasioned simply and solely by accident; and, third, that it might have been the result of assassination; and that, if the jury found that there was a failure on the part of the defendant to prove that Hall committed suicide, (whether he was in his right mind or laboring under temporary insanity being wholly immaterial,) or if they found upon the proofs that his death was caused by accident and nothing else, there must be a verdict for the plaintiff.

The defendant excepted (1) to the instruction that, on the question whether Hall committed suicide or not, the burden of proof was on the defendant to satisfy the jury by evidence which in their judgment outweighed that of the plaintiff that his death was by suicide; (2) to the charge that the proofs of death were proper evidence in the case, but by no means conclusive; (3) to the submission to the jury of the question whether Hall died as the result of assassination, and to the charge that the evidence must be such as satisfied the jury of the truth of the fact in dispute.

Before the case was summed up to the jury by counsel—which was done before the giving of the charge—the defendant presented to the court 15 several written requests to charge the jury. These requests are inserted in the bill of exceptions after the statement of the charge and the exceptions thereto, and it is stated in regard to each of the requests that the court refused so to charge “except as already charged,” and that the defendant excepted to each refusal to charge.

Although there are 25 alleged errors set forth in the assignment of errors filed in the court below, yet, as the brief of the plaintiff in error relies on but a few of them, we confine our attention to those thus relied on.

1. One Andrew S. Brownell was examined as a witness for the defendant. At the time he was examined—in February, 1888—he was one of its directors, and had been its secretary in 1885. In December, 1886, he received, on behalf of the defendant, from one John Sherman Moulton, as agent of the plaintiff, certain proofs of death in the case. He testified that on that occasion he had a slight conversation with said Moulton on the subject of such proofs of death; that he (Brownell) looked at them, and said they were incomplete,—that the coroner's verdict did not accompany them,—and that Moulton said it would be supplied in a few days. Brownell was then asked by the defendant: “Question. What was the substance of the understanding between you as to the man-

ner in which Mr. Hall met his death, if that was mentioned between you?” His answer was: “Answer. That he had met his death by his inflicting a pistol-shot; and that we must have the coroner's verdict, which he said would be furnished in a few days; and it came a few days later.” Brownell was then asked by the plaintiff: “Q. Did you say to Mr. Moulton that you had known Mr. Hall well, in California; and that, if it depended upon you, the loss should be paid without any delay? Did you state that in that conversation or in any subsequent conversation?” This was objected to by the defendant as irrelevant, but the question was allowed, and the defendant excepted. The answer was: “A. I think that I expressed such a personal feeling in the matter.” He was then asked by the defendant: “Q. You say that you expressed such a personal feeling for Mr. Hall. What was your feeling as to your obligations to the defendant, in view of the risk excluded from the policy, and the fact of the wound being self-inflicted? A. In view of the policy of the company, as shown in the certificate that has been presented here, the company could not pay it. It was against the policy of the company to assume the risk of a man's death by shooting or by self-inflicted wounds. Q. When you say that it was against the policy of the company, what do you mean by that? A. Against the decision of the managers of the company as to the best interests of the company, taken as a whole. I did not mean the mere terms of the policy, but the settled course of business of the company.”

It is contended by the defendant that the declaration by Brownell to Moulton that, if it depended upon him, (Brownell,) the loss should be paid without any delay, was irrelevant, and the admission of it in evidence constituted error. But we think the evidence was admissible. Brownell was a witness for the defendant, and the evidence in question was brought out on his cross-examination. He had stated on his direct examination that the substance of the understanding between him and Moulton, at the time the latter brought in the proofs of death, as to the manner in which Hall met his death, was “that he had met his death by his inflicting a pistol-shot;” and the evidence in question, being drawn out on cross-examination, had a bearing upon the testimony which Brownell had given on his direct examination, implying that Moulton had stated that Hall met his death “by his inflicting a pistol-shot.” The evidence was as to a part of the same conversation, and we think it was relevant and competent.

2. On the direct examination of Mr. Brownell as a witness for the defendant he was asked the substance of a conversation which he had with one Charles W. Moulton, the agent or attorney of the plaintiff, in November, 1886, on an occasion when said Moulton,

on behalf of the plaintiff, visited Brownell at the office of the defendant. The question was objected to by the plaintiff as immaterial, and was excluded, and the defendant excepted. A sufficient answer to this assignment of error is that the bill of exceptions does not state what the subject of the conversation was, or what was intended to be proved by it.

Charles W. Moulton was the father of John Sherman Moulton. Subsequently, when Brownell had been recalled by the defendant, and it had been proved that Charles W. Moulton was the plaintiff's agent, the question was repeated by the defendant as to what Charles W. Moulton said to Brownell when he visited the latter to make a claim on the defendant for the payment of the \$5,000. The inquiry was again ruled out, it not being stated what the subject of the conversation was, or what was sought to be proved. The proofs of death were furnished to the defendant after this alleged conversation; and, even if the conversation related to the cause or manner of Hall's death, it could not bind the plaintiff, in the absence of any authority by the plaintiff to Moulton to make any statement on the subject.

3. It is contended by the defendant that the proofs of death, including the coroner's inquest, constituted an admission by plaintiff that Hall came to his death by his own hand, and that such admission was sufficient to create a legal right in the defendant to have a verdict directed for it. One of the defendant's requests to charge was that, the plaintiff, in her proofs of death, having stated to the defendant that the death was by suicide, it was incumbent upon her to prove by a preponderance of evidence that the statement was mistaken, and that the death was the result of accident; and another was that, the plaintiff's proofs of death having been presented in her name, and by her agent in the matter, and constituting the essential preliminary to her action, they must stand as her acts, and the representations made therein must be taken as true, until at least some mistake was shown to have occurred in them.

The facts of this case are thus stated in the charge of the court to the jury, and there was no exception to such statement: "It appears to be undisputed that Edward F. Hall had lived about twenty years of his life in San Francisco. He frequently—habitually, perhaps—carried a pistol. He some time during his life kept a pistol under his pillow. He was a man of genial, sanguine temperament; hopeful,—making plans as to the future; proud of his only son. But it also appears that for a long series of years he had been suffering from severe headache,—to such an extent that it created depression so strong at times that the doctor describes it as melancholia. It appears, further, that upon the evening prior to his death he was with a party of friends at the residence of Mr. Johnson, and there, in the presence of two or

three witnesses, complained of suffering intense pain in his head, frequently placing his hands to his head, and complaining of the severe pain which he suffered. The pecuniary circumstances of Hall have not been disclosed here further than the evidence as to borrowing money of his sister. It is in proof that he had a wife and son, his son in college, and that he took great interest in his future. But it is also proper that I should call your attention to the fact that at the moment of his death his wife was seriously ill—thought to be hopelessly ill—in a distant city. Upon the morning of the 19th of October, 1886, at 139 East Twenty-first street, in this city, and between 7 and 7:30 o'clock of that morning, Edward F. Hall was found in the back hall bedroom of the fourth story, with a severe wound in his right temple. The wound was so severe that it caused a comminuted fracture of the frontal bone, and fractures radiating up and down and backward from the hole in the right temple, sufficient, unquestionably, to produce his death. He was found lying upon his bed, with the clothes drawn up under the armpits, his limbs relaxed, no evidence of any struggle having taken place, and near his right hand—within a few inches, or very near it—was the pistol, probably, which has been shown in your presence, with three of its chambers discharged. There was also found upon his stand or desk a letter to his physician, in substance stating that he has been suffering terribly with headache; that he has had it for several days; that it is growing worse, and has become well-nigh unbearable."

In the proofs of death furnished to the defendant, and signed by the plaintiff, was this question: "Was the death of deceased caused by his own hand or acts, or in consequence of a duel, or in violation of any law?" Her answer to this was: "See statement of coroner's physician, Dr. Jenkins." In the statement of Dr. Jenkins was this question: "State the immediate cause of death." His answer was: "Shock from penetrating pistol shot; wound of head, (right temple); mental aberration, superinduced by chronic headache." There was also this question to Dr. Jenkins: "Was the death of deceased caused or accelerated or aggravated by his own hand or acts?" His answer was: "I examined the deceased only as coroner's physician, and therefore am unable to make any further statement than above, other than from the history. His mental condition was probably due to chronic headache, which was caused either by chronic meningitis or tumor of brain."

It is contended for the defendant that, because of the contents of the proofs of death, the plaintiff is estopped from claiming that Hall's death was caused otherwise than by suicide; and that, at least, the court should have held that the burden originally upon the defendant was shifted, by the introduction of the proofs of death, to the plaintiff, and

it became her duty to satisfy the jury, by a preponderance of evidence, that Hall died otherwise than by his own hand.

But the defendant was not prejudiced by the statements and opinions contained in the proofs of death, and the plaintiff was not estopped thereby, as a matter of law. When the court was asked to charge the jury that by the introduction of those proofs the burden was shifted, the evidence was all before the jury, and was much more full and complete than that upon which Dr. Jenkins had based his opinion. He himself had been examined as a witness, and had testified as to what he knew or did not know at the time he made his certificate; and all the facts of the case, so far as they were known, had been explained in view of the contents of the proofs of death. It appeared that most of the statements in the certificate of Dr. Jenkins were based on hearsay. The instructions asked for in that respect, therefore, would have been erroneous.

Nor did the declarations in the proofs of death, when all taken together, necessarily amount to an admission that Hall committed suicide. The facts, or what Dr. Jenkins at the time supposed to be the facts, were stated in the proofs of death; and, although the defendant might have drawn therefrom the conclusion of suicide, they ought to be scrutinized carefully when they are sought to be used as amounting to an admission by the plaintiff that the policy was void. The language used by Dr. Jenkins in his certificate is not inconsistent with the theory of death by accident, especially in view of the fact that, when he came to the direct question as to whether Hall's death was caused by his own hand or acts, he answered it by stating that he was "unable to make any further statements than above, other than from the history;" the statements he had made above being that the "immediate cause of death" was "shock from penetrating pistol-shot; wound of head, (right temple;) mental aberration, superinduced by chronic headache." The jury were entirely at liberty to properly find that that wound, although self-inflicted,

was accidental. The proofs of death, and the entire evidence at the trial, left it in doubt how Hall's death was caused, and it was for the jury to determine by their verdict. The court charged the jury that, if they should find that Hall's death was caused by accident, they should find for the plaintiff. There was no exception to that instruction, and the case was tried on the theory that that was a correct construction of the policy. The sixth request of the defendant to charge was that, if the jury should find that Hall shot himself "in any manner except as by mere accident," the defendant was entitled to a verdict; the tenth request was that the plaintiff had failed to give any evidence that the death was accidental; and the twelfth request was that the defendant was not bound to exclude every theory of accident.

4. As to the exceptions to the charge of the court to the jury, we see no error therein. It is contended that there was no evidence from which the jury could find, as an affirmative fact, that Hall died by accident or assassination. In regard to this, as before remarked, the bill of exceptions does not purport to set forth all the evidence in the case. It was conceded that, if Hall's death was by accident or assassination, the policy covered it, and, on the evidence given in the bill of exceptions, we think the jury were fully warranted in finding that it was by accident. The defendant having alleged in its answer that Hall's death was due to one of the causes excepted from the operation of the policy, it was not error for the court to charge the jury that the defendant was bound to establish such defense by evidence outweighing that of the plaintiff.

We think the court properly refused to charge in accordance with the requests made by the defendant, except as it had already charged, and that it had already charged in terms sufficiently full and correct as to the particulars now insisted upon to have been erroneous. Judgment affirmed.

Mr. Justice BROWN dissenting.

ANHEUSER-BUSCH BREWING CO. v.
HUTMACHER.

(21 N. E. 626, 127 Ill. 652.)

Supreme Court of Illinois. April 5, 1889.

Appeal from appellate court, Third district.

The plaintiff's first instruction, referred to in the opinion, was as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff, Hutmacher, at the request of the defendant, performed the services and did the work and labor for the defendant in and about the purchase of ice, and also in and about the construction of an ice-house at Tompkins, or Busch, in Missouri, as claimed by him, and that in addition thereto the said Hutmacher filled the said ice-house, or partly filled the same, and also certain barges of defendant, with ice, at the request of the defendant, and that such filling with ice was done by the said Hutmacher for the defendant under a contract with the defendant that the said defendant should pay said Hutmacher ten cents per ton for all the ice so put in said ice-house and said barges by said Hutmacher, then the said Hutmacher would be entitled, in addition to his compensation for services, work, and labor in the purchase of ice, as aforesaid, and in the construction of the said ice-house, whatever amount the amount of ice so filled in the said ice-house and said barges, by said Hutmacher, would amount to at ten cents per ton, so far as the same may be shown by the evidence, deducting whatever the jury shall believe from the evidence has been paid to the said Hutmacher; unless the jury shall believe from the evidence that the said Hutmacher has been fully paid for his said services, work, and labor, and the filling, or part filling, of the said ice-house and barges, or has accepted from the defendant a certain sum of money in full satisfaction and discharge of all of the said claims and demands of the plaintiff." The objection urged to said instruction was that the court thereby told the jury that, unless they should believe that the said Hutmacher had accepted of defendant a certain sum of money in full satisfaction and discharge of all his claims and demands, he would be entitled to a verdict for whatever the ice, so placed in said ice-house and barges, would amount to, at ten cents per ton. The instructions on behalf of defendant which were refused by the court were as follows: "(1) The court instructs the jury that long delay, in claiming or demanding a money debt, by one in necessitous circumstances, and where, if it was honestly due, it could be had for the asking, would be a circumstance tending to prove that no such indebtedness, in fact, existed between the parties; and that, in determining whether the demand, in any case, is well founded or not, the reasonableness or unreasonableness of the claim, in view of all the surrounding facts and circumstances, should be taken into account. (2) The court

instructs the jury that, where the testimony of a witness is so extraordinary as to be manifestly contrary to all human observation and experience, and so manifestly repugnant to right reason as to appear, when taken in connection with its related facts and surrounding circumstances, incredible and unnatural,—as if one should say he had, in the open market, of a sane and intelligent person, purchased a genuine coin of the value of five dollars for a penny,—then, in that event, such testimony may be by them wholly disregarded and for naught held, as being contradicted by human reason and the common experience of mankind."

George W. Fogg, for appellant. Carter & Govert, for appellee.

BAILEY, J. This was a suit in *assumpsit*, brought by Rudolph Hutmacher against the Anheuser-Busch Brewing Association, a corporation organized and doing business at St. Louis, Mo., to recover for work, labor, and services of the plaintiff in superintending the erection of an ice-house, and cutting, storing, and purchasing ice for the defendant. The trial in the circuit court resulted in a judgment in favor of the plaintiff for \$1,640 and costs, which judgment was affirmed by the appellate court on appeal, and by a further appeal the record has been brought to this court. To the declaration, which consisted of only the common counts, the defendant pleaded *non assumpsit* and the payment by the defendant to the plaintiff of certain sums of money, which were received by the plaintiff in full satisfaction and discharge of the indebtedness sued for. Upon the issues thus formed the evidence was to a considerable degree conflicting. But, as all questions of fact have been conclusively settled by the appellate court, we must accept the verdict and judgment as the only proper result of the evidence, it being open to this court to review the record only so far as it may be shown to contain errors of law.

Error is assigned upon the refusal of the court to grant the defendant's motion for a continuance. Said motion was supported by an affidavit showing the absence of five witnesses, all residents of St. Louis, and all being officers or employes of the defendant, viz.: Adolph Busch, its president; Erwin Spraul, the general superintendent of its outdoor business; Gustav Housman, its assistant secretary; George Krug, its general and commercial agent; and Henry Jacobs, its master carpenter and builder. The materiality of the testimony of each of these witnesses seems to be sufficiently shown, and the only question is whether there is sufficient proof of diligence in endeavoring to procure their attendance. The affidavit shows that at a prior day of the same term the defendant had all of said witnesses in court ready to testify, but that at the time of making the affidavit for a continuance they were all absent from the state, Krug and Jacobs being temporarily in Nebraska, Hous-

man being in attendance upon the circuit court at Kansas City, Mo., as a witness, and Busch and Spraul being both confined to their houses in St. Louis by sickness. The court held the affidavit sufficient so far as it related to witnesses Busch and Spraul, but insufficient as to the others, and, the plaintiff electing to admit the affidavit in evidence so far as it related to the testimony of Busch and Spraul, the motion for a continuance was overruled. The rule is too familiar to require the citation of authorities that, to entitle a party to a continuance on account of the absence of material witnesses, it must be shown that due diligence has been used to obtain their testimony. That the affidavit in this case fails to show such diligence is too plain for argument. All of the absent witnesses were in court one day during the earlier part of the same term, and were therefore within reach of process, but neither was served with subpoena, nor is it pretended that any attempt was made to subpoena them. All were officers or employés of the defendant, and subject to its orders, and it will be presumed that their attendance before a commissioner might have been procured at any time, yet no efforts are shown to have been made to obtain their depositions, although the suit had been pending more than eight months, and had been once continued at the instance of the defendant on account of the absence of witnesses. Upon such a showing as to diligence, the motion for a continuance was properly overruled.

Complaint is made of various rulings of the court in relation to the admission of evidence. While the plaintiff was on the stand as a witness in his own behalf, the defendant's counsel, on cross-examination, put to him questions as to the defendant's solvency and his own insolvency during the period which intervened between the accruing of the indebtedness sued for and the commencement of the suit. These questions were objected to on the ground that they were not proper cross-examination, and the objection was sustained. No questions had been put to the witness, on his direct examination, as to the solvency of the defendant, or his own insolvency, or in any way involving those subjects, and therefore, according to the well-settled practice in this state, it was not open to the defendant to put to the plaintiff questions in relation to them on cross-examination. *Stafford v. Fargo*, 35 Ill. 481; *Bonnet v. Glattfeldt*, 120 Ill. 166, 11 N. E. Rep. 250; *Lloyd v. Thompson*, 5 Ill. App. 90; *Waller v. Carter*, 8 Ill. App. 511. See, also, *Railroad Co. v. Stimpson*, 14 Pet. 448; *Floyd v. Bovard*, 6 Watts & S. 75; 1 Greenl. Ev. § 445. If the defendant deemed the inquiry material, it should have introduced evidence in relation thereto, either by recalling the plaintiff, or by the production of other testimony, after the plaintiff had closed his case.

Complaint is also made of the ruling of the court sustaining an objection to questions put to the plaintiff on cross-examination,

calling for the contents of a certain letter written by Spraul to the plaintiff, and which appears to have been lost. These questions were excluded, on the ground that they were not proper cross-examination, but it is sufficient to say that no exception to the ruling was preserved, and its propriety is therefore not open to review.

The court also sustained objections to questions put to the plaintiff on cross-examination, as to the gross cost of putting up the ice, for which he claims a commission by contract of 10 cents per ton. The witness was not examined on that subject on his direct examination, and for that reason the questions objected to were improper. Moreover, the plaintiff was seeking to recover upon an express contract with the defendant as to the amount of his compensation, and under such contract the amount of the gross cost of cutting and putting up the ice would seem to be immaterial.

A number of telegrams in relation to the labor and services sued for, and purporting to have been sent by the defendant to the plaintiff, were produced by the plaintiff, and, on proof that they were received by him from the telegraph company in the usual course of business, they were admitted in evidence, against the objection and exception of the defendant. Several letters of dates contemporaneous with the telegrams written by the defendant to the plaintiff were also read in evidence, in which the defendant admitted having communicated with the plaintiff by telegraph, and in some of which letters copies of the telegrams sent were given, the same being exact copies of telegrams of the same date, read in evidence. The position now taken is that the papers delivered by the telegraph company to the plaintiff are only copies, the originals being the telegrams signed by the defendant, and delivered by it to the telegraph office from which the message was sent, and it is urged that such originals should have been produced, or some proper foundation laid for the introduction of secondary evidence of their contents. The application of the rule of evidence here contended for must depend upon whether the messages delivered by the telegraph company to the plaintiff, or those delivered by the defendant to the telegraph operator, are, as between the parties in this suit, to be deemed the originals. In *Durkee v. Railroad Co.*, 29 Vt. 127, the rule which we consider the most reasonable one is laid down, viz.: That the original, where the person to whom it is sent takes the risk of its transmission, or is the employer of the telegraph, is the message delivered to the operator; but where the person sending the message takes the initiative, so that the telegraph company is to be regarded as his agent, the original is the message actually delivered at the end of the line. See, also, *Saveland v. Green*, 40 Wis. 431; *Telegraph Co. v. Shotter*, 71 Ga. 760; *Wilson v. Railroad Co.*, 31 Minn. 481, 18 N. W. Rep. 291; *Dunning v. Roberts*, 35 Barb. 463;

Gray, Tel. §§ 104, 129. The same rule was adopted by this court in *Morgan v. People*, 59 Ill. 58.

The fact that the defendant took the initiative in sending the telegrams, thus employing the telegraph company as its agent, is clearly shown by its letters to the plaintiff, read in evidence. Having thus employed such agent to convey communications to the plaintiff, it must be held to be bound by the acts of its agent to the extent at least of making the messages delivered originals, thereby constituting them primary evidence of the contents of the messages sent. It should be observed that there is no suggestion that any of these messages were erroneously transmitted, and the case, therefore, does not present the question, upon which

there is some conflict in the authorities, whether the sender of a telegram makes the telegraph company its general agent so as to become responsible for the acts of such agent, where there is a departure from the authority actually given, by transmitting the message incorrectly.

Some criticisms are made upon the rulings of the court in giving the plaintiff's first instruction, and in refusing two instructions asked by the defendant. The plaintiff's first instruction is a correct statement of the law applicable to the case, and the objection urged to it is not well taken. Both the defendant's instructions refused are clearly erroneous. We find no error in the record, and the judgment of the appellate court will therefore be affirmed.

CHICAGO, M. & ST. P. RY. CO. v. ARTERY.
(11 Sup. Ct. 129, 137 U. S. 507.)

Supreme Court of the United States. Dec. 22,
1890.

In error to the circuit court of the United States for the northern district of Iowa.

John W. Cary, for plaintiff in error. *H. B. Fouke* and *D. E. Lyon*, for defendant in error.

BLATCHFORD, J. This is an action at law, brought in the district court of Dubuque county, in the state of Iowa, by James Artery against the Chicago, Milwaukee & St. Paul Railway Company, a Wisconsin corporation, to recover damages for a personal injury, and removed by the defendant into the circuit court of the United States for the northern district of Iowa. The petition alleges that the defendant owns and operates a line of railroad from Dubuque, in Iowa, to La Crosse, in Wisconsin, and St. Paul, in Minnesota, and in the operation of it uses locomotives propelled by steam, hand-cars propelled by hand, and cars drawn by its locomotives; that the plaintiff, on March 5, 1883, and for several months prior thereto, was in the employ of the defendant in the use and operation of the road in the county of Allamakee, in Iowa, in working upon its road and road-bed, in keeping the ties in good order, in keeping the road well and properly ballasted, in removing obstructions from its track, in keeping its culverts and crossings in repair, in keeping the iron on the road properly spiked and fastened, and in keeping the road-bed fit for use and operation along its line of road and right of way in the county of Allamakee; that in doing such work, cars propelled by steam and hand-cars were used by the plaintiff and others, the cars being furnished by the defendant; that while in such employ, the plaintiff left the village of Harper's Ferry, in said county, with other employes, under a foreman of the defendant, named Rellehan, and went north some 10 miles, making repairs on the road; that, after doing such work, and towards evening, the foreman ordered a start to return to Harper's Ferry, on a small hand-car, on which were placed seven or eight men, and more than the car could or ought to carry; that, when the hand-car was ordered by the foreman to start to Harper's Ferry, it was started at the time that a train of cars was due, of which the plaintiff then had no knowledge; that the snow had been falling, and there was snow on the rails, and the foreman ordered the plaintiff to get a shovel and seat himself on the front of the hand-car, and hold the shovel on the top of the rail, in order to remove the snow as the hand-car went forward; that on the hand-car there were no places provided for the feet to rest upon while performing such duty; that the plaintiff was compelled, in order to hold the shovel, to exert all his strength, and by muscular exertion hold up his feet and at the same time guide and hold the shovel; that the hand-car was run ahead of the train, then due, at the rate of more

than 10 miles an hour, being a dangerous speed; that while it was so running, and the plaintiff was holding the shovel, and while it was crossing over a cattle-guard in the road, and without any fault or negligence on his part, his foot was caught, and he was thrown off and under the hand-car, his body doubled up, his spine injured, and his backbone broken; that by reason thereof he has been confined to his bed ever since, unable to work, and suffering great pain in body and mind; and that all this happened by the negligence of the defendant in furnishing unfit and improper hand-cars, in requiring onerous and dangerous duty from the plaintiff, in running the hand-car at a dangerous rate of speed, and in overloading it. Damages are claimed in the sum of \$20,000, besides the sum of \$1,000 for money paid for board, care, and surgical and medical treatment. The petition was afterwards amended by alleging further that the hand-car was not constructed with reasonably safe appliances to push the snow off from the rails, which appliances could easily have been furnished by the defendant; that it was wanting in the proper kind of a brake, and the proper kind of a foot-rest for doing the kind of work which the plaintiff was ordered to do; that, when the plaintiff was ordered by the foreman to sit down on the front of the hand-car and hold the shovel, he was unaware of any danger therefrom, and had reason to believe and did believe that the hand-car would be run by the foreman at a safe rate of speed; that it was run at an unreasonable and unnecessary fast and dangerous speed, which the plaintiff could not control, nor could he leave the car while it was in motion; that the cattle-guard was made of three-cornered pieces of wood, placed negligently on top of the ties, across the track instead of lengthwise, and some of the three-cornered pieces stood higher than the surface of the rail, of which fact the plaintiff was not then aware; and that, by reason of such negligent construction of the cattle-guard, the speed of the hand-car, and the dangerous and tiresome position in which the defendant placed the plaintiff, he was injured either by his foot or feet coming in contact with the rail or the three-cornered pieces, or by the shovel getting caught on the rail or on such pieces, or by all of such circumstances. The answer of the defendant contains a general denial, and an allegation of contributory negligence on the part of the plaintiff. The case was tried by a jury, which rendered a verdict for the plaintiff of \$13,500, for which, with costs, he had judgment, to review which the defendant has brought a writ of error.

One of the principal points taken by the defendant is that this was a case of an injury resulting from the negligence of a co-employee, namely, the foreman Rellehan, in the management and running of the hand-car, and did not fall within the provisions of the statute of Iowa on the subject. On the 8th of April, 1862, a statute was enacted in Iowa (Laws 1862, c. 169, § 7, p. 198,) as follows: "Sec. 7. Every railroad company shall be liable for all damages sustained by any person, including em-

ployes of the company, in consequence of any neglect of the agents or by any mismanagement of the engineers or other employes of the corporation to any person sustaining such damage." This provision was afterwards modified by section 1307 of the Code of Iowa of 1873, which was in force at the time of this accident, and read as follows: "Sec. 1307. Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers, or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employes, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." The modification introduced by the later statute is that the wrongs for which the corporation is to be liable must be wrongs connected with the use and operation of the railway on or about which the employes are employed. It is contended by the defendant that, under the decisions of the supreme court of Iowa upon this statute, only employes engaged in operating and moving trains, and who are injured by such trains, and employes who, while in the discharge of their duty, are injured by trains used in operating the railway, are within the statute, and that, in the present case, the plaintiff was not engaged in operating and moving a train, and was not injured by a train used in operating the railway. But we cannot concur in this view.

In *Deppe v. Railroad Co.*, 36 Iowa, 52, it was held, under the act of 1862, that the statute included the case of an employee who was engaged in connection with a dirt-train, and was injured, while loading a car, by the falling of a bank of earth. and in *Frandsen v. Railroad Co.*, Id. 372, that a person employed as a section-hand, in the business of keeping a certain part of the road in repair, and going with his co-employees on the track on a hand-car for that purpose, was within the act of 1862, he being injured through a collision with the engine of a passenger train, which struck the hand-car, and threw it against the plaintiff while he was on the ground, and engaged in trying to remove the hand-car out of the way of the engine.

The case of *Schroeder v. Railroad Co.*, 41 Iowa, 344, arose under section 1307 of the Code. It was said in that case that that section applied only to accidents growing out of the use and operation of the road, and did not apply to all persons employed by the corporation without regard to their employment, and it was held, therefore, that it did not cover the case of *Schroeder*, who was not connected with the operation of the road, but who, while engaged in removing the timbers of an abandoned bridge, and loading them on cars, was injured by some of the timbers which fell from a car. The same view was held in *Potter v. Railroad Co.*, 46 Iowa, 399, where *Potter*, a laborer in

the machine-shop of the company, was injured by a locomotive driving-wheel, which he and other employes were moving by hand.

It was held, in *Schroeder v. Railroad Co.*, 47 Iowa, 375, that where a person was required in the course of his employment by the railroad company to get upon a train, and did so, he was to be regarded as being engaged in its operation, although his employment might not be connected with the running of the train; and that the company was liable to him for injuries resulting from the negligence of a co-employee.

In *Pyne v. Railroad Co.*, 54 Iowa, 223, 6 N. W. Rep. 281, *Pyne* was employed by the railroad company as a private detective, and, while walking on the track, in the performance of his duties, and in obedience to the orders of the company, was injured, without negligence on his part, through the negligence of the engineer of a passing train, and it was held that his case fell within the provisions of section 1307, and that he was entitled to recover from the company for the injuries received by him.

In *Smith v. Railroad Co.*, 59 Iowa, 73, 12 N. W. Rep. 763, where it appeared that the plaintiff was only a section-hand, and, when injured, was engaged in loading a car, and it did not appear that his service pertained to the operation of the road, it was held that he could not recover for an injury which occurred through the negligence of a co-employee, the court remarking that under section 1307 of the Code it must be shown that his employment was connected with the operation of the railway.

It was held, in *Malone v. Railway Co.*, 61 Iowa, 326, 16 N. W. Rep. 203, that a person whose duty it was to wipe the company's engines, and do other work about the round-house, and to open the doors of that house so as to allow the engines to pass in and out, and who, while endeavoring to shut those doors, was injured by the carelessness of his co-employees who were at the time engaged with him in the same effort, could not recover under section 1307 for the injury, because it was not "in any manner connected with the use and operation" of the railway, as contemplated by that section.

In *Foley v. Railroad Co.*, 64 Iowa, 644, 21 N. W. Rep. 124, it was held that a car-repairer, whose duty it was to repair cars on the track, but who had nothing to do with cars in motion, except to ride on passenger or freight trains to and from the places where his services were required, was not engaged in the operation of a railway, within the meaning of section 1307, and could not recover of the company for an injury received while in the discharge of his duties, through the negligence of a co-employee. *Foley* was engaged at the time in making repairs on a car, and was injured while under the car, through its being moved improperly.

The *Malone* Case came up again, in 65 Iowa, 417, 21 N. W. Rep. 756, and it was there held, that *Malone*, whose duty it was to wipe engines, open and close the doors of an engine-house, and remove

snow from a turn-table and connecting tracks, was not, by reason of such duties, employed in the operation of the railroad, within the meaning of section 1307; and that, for an injury received by him while performing such duties, and through the negligence of a co-employee, he could not recover against the company, although he might have had other duties to perform which did pertain to the operation of the road.

It was held, in *Luce v. Railroad Co.*, 67 Iowa, 75, 24 N. W. Rep. 600, that a person employed in a coal-house of the railroad, and injured by the negligence of a co-employee while loading coal upon a car, could not recover from the company under section 1307, because the injury was not in any manner connected with the use and operation of the railway.

In *Matson v. Railroad Co.*, 68 Iowa, 22, 25 N. W. Rep. 911, the plaintiff was a member of a construction gang on the road, and his duties required him to ride upon, and to work upon and about, the company's cars and tracks. He was injured by the negligence of a co-employee in throwing a heavy stone upon his hand, while he was engaged in placing stones under the ends of the ties. It was held that the injury was not connected with the use and operation of the railway, as contemplated in section 1307, and that the company was not liable.

It was held, in *Stroble v. Railroad Co.*, 70 Iowa, 555, 31 N. W. Rep. 63, that a person whose sole duty it was to elevate coal to a platform convenient for delivering it to the tenders of engines, was not employed in the use and operation of the railway, within section 1307, because he was in no way concerned with the moving and operation of trains.

In *Pierce v. Railway Co.*, 73 Iowa, 140, 34 N. W. Rep. 783, a mechanic from a shop of the company was working, under orders, upon a ladder which leaned against one of the cars of a train. The trainmen moved the train backward, without notice to him, the ladder fell, and he was injured. It was held that the negligence, whether that of the trainmen or of the foreman in not giving the requisite information to the trainmen, was connected with the use and operation of the railway, and was the negligence of some one employed on it, so as to make the company liable, under section 1307, for the injury sustained by the plaintiff, and this although he was not engaged in the operation of the railway.

It was held, in *Nelson v. Railroad Co.*, 73 Iowa, 576, 35 N. W. Rep. 611, that the working, on the railway, of a ditching machine which was operated by the movement along the track of the train of which it formed a part, was an employment connected with the use and operation of the railway, within the meaning of section 1307, and made the company liable for injury to an employee through the negligence of a co-employee, although the plaintiff was not engaged in the actual movement of the train, but was only one of the crew necessary for the performance of the work intended to be done by the train and its machinery and appliances.

In *Rayburn v. Railway Co.*, 74 Iowa, 637, 35 N. W. Rep. 606, and 38 N. W. Rep. 520, the plaintiff and others were section-hands of the company, engaged in removing snow and ice from the track, when a train of cars loaded with slack came along, moving slowly, and the conductor and others in charge of the train directed them to get upon the train to unload the slack. They requested that the train be stopped, but were told that if it was stopped it could not be started again. In attempting to obey the order, the plaintiff was thrown down by a jerk of the train and injured. It was held that he was not precluded from recovering against the company under section 1307, on the ground that the negligence complained of was not connected with the use and operation of the railway.

From this statement of the decisions of the supreme court of Iowa, we are clearly of opinion that, in the present case, the defendant was liable, under section 1307 of the Code, for the injury to the plaintiff caused in the manner set forth in the petition, and in the evidence contained in the bill of exceptions. The plaintiff was upon a moving car propelled by hand-power. The movement of the car, its speed, the position of the plaintiff upon it, and the duties he had to discharge in that position, were under the direction of the foreman, who was upon the same car. The injury was directly connected with the use and operation of the railway, in whose common service the foreman and the plaintiff were, and they were co-employees. The injuries to the plaintiff were, by the petition and the evidence, sought to be attributed to the smallness of the hand-car, its being overcrowded, the failure to provide it with contrivances for removing snow from the track, the absence of a proper brake, the want of foot-rests, and the arrangement of the cattle-guard. The railway was being used and operated in the movement of the hand-car quite as much as if the latter had been a train of cars drawn by a locomotive. If a single locomotive be on its way to its engine-house, after leaving a train which it has drawn, or if it be summoned to go alone for service to a point more or less distant, and, in either case, by the negligence of one employee upon it, another employee is injured, the injury takes place in the use and operation of the railway, under section 1307, quite as much as if it takes place while the locomotive is drawing a train of cars. This we understand to be the manifest purport and effect of the decisions of the supreme court of Iowa on the subject, as well as obviously the proper interpretation of the statute. But, although this is so, we are of opinion that a new trial must be granted, on account of errors in the exclusion of evidence offered by the defendant.

At the trial, one Jerry Artery, a brother of the plaintiff, was called as a witness by him. He was on the hand-car with the plaintiff at the time of the accident, and saw all that occurred. He testified as to the speed of the car, and as to its size, and its cramped and crowded condition, and as to the fact that there was nothing on

it in front upon which the plaintiff could rest his feet while he was holding the shovel, and as to the arrangement of the cattle-guards. In the course of his cross-examination, the following proceedings occurred: "Question. On the 23d of March, 1886, at Harper's Ferry, in the presence of Mr. Buell, did you sign a written statement, stating what you know about this case, and about the accident to your brother, after the written statement had been read over to you? Answer. Yes, sir. Q. I will show you now the written statement, and ask you whether that is your signature? (Written statement shown the witness hereto attached and marked 'Exhibit A.'). A. That is my signature there. Q. In the written statement which I have just shown you you state as follows: 'At the time Jim got hurt we were running from $4\frac{1}{2}$ to 5 miles an hour—certainly not to exceed 5 miles.' Is that statement correct? (Objected to by plaintiff; objection sustained.) The grounds upon which the court sustained the objections to interrogatories to this and other witnesses, based upon a written statement signed by the witness, and to the introduction of the written statements themselves, were that it appeared that the statements were not volunteered by the witnesses, but that the company had sent its claim agent, after the happening of the accident, to examine the employees of the company who were present at the time of the accident, in regard to the transaction; that the statements made by the witnesses were not taken down in full, but only a synopsis thereof made by the agent, the correctness of which is questioned by the witnesses in some particulars, although such written statement was signed by the witness; that, upon the trial of this case, these statements, thus obtained, were sought to be used not alone as a means of impeaching the witness, but as evidence of the matters therein recited; that it is apparent to the court that, whether so intended or not, these statements become a ready means of confusing and intimidating witnesses before the jury, and that, if it be permitted to parties to thus procure written statements in advance from witnesses, and then use the same in examining such witnesses, it will enable parties to shape and control the evidence in a cause by committing the witnesses to particular statements, couched in the language not of the witness, but of the person carrying on such *ex parte* examination; that these growing abuses can only be prevented by entirely excluding such statements thus procured from being introduced in evidence for any purpose; that, if the party desired to impeach a witness by showing contradictory statements made by him, the person to whom or in whose presence such alleged contradictory statements were made should be called as a witness, so that opportunity might be afforded of placing before the jury the statements actually made by the witness sought to be impeached, and not a mere synopsis thereof made by another person, and the accuracy of which, in some particulars, was challenged. Except-

tion by defendant." The following further proceedings took place on the cross-examination of the same witness: "Question. On the occasion I have referred to, did you make this statement: 'Six men on a hand-car have plenty of room. We often had 8 and 10 men on a hand-car of the same size?' (Objected to by plaintiff; objection sustained; exception by defendant.) Q. Did you, on the occasion I have referred to, at Harper's Ferry, say as follows: 'I am a larger man than Jim ever was, and my legs are a great deal longer. I have never had any trouble in keeping my feet up when I sat on the front of the car?' (Objected to by plaintiff; objection sustained; exception by defendant.) Q. On the occasion referred to, did you state as follows: 'If a man is holding a shovel on the rail and he is sitting on the front of a hand-car there is no way for him to get hurt unless he forgets himself and lets his feet drop down?' (Objected to by plaintiff; objection sustained, exception by defendant.) Q. On the occasion referred to, did you state: 'The hand-car was in good condition, nothing broken about it in any way. It was an ordinary car, full size?' (Objected to by plaintiff; objection sustained; exception by defendant.) Q. Did you, on the occasion referred to, state as follows: 'I am foreman at present on section No. 20. The top of the ribbons on the ties of the cattle-guard was about level with the ball of the rail?' A. Well, sir, I don't remember whether I did or not say that. Q. If you did say that, was it the truth or not? (Objected to by plaintiff; objection sustained; exception by defendant.)" Subsequently, while the defendant was putting in its evidence, the bill of exceptions says: "Thereupon the defendant offered in evidence, for the purpose of impeachment, the statement under date of March 23, 1886, shown the witness Jerry Artery, and hereto attached, marked 'Exhibit A,' which, on objection by plaintiff, was ruled out by the court; to which ruling the defendant at the time excepted." The court, in sustaining the objection, stated that it deemed the proper method to be to produce the person to whom the alleged statement was made, and to prove by him what the witness may have said on the occasion. Exhibit A, thus referred to, is a paper signed by the witness, and contains the statements set forth in the six questions thus excluded, as above.

That the evidence covered by the six questions was material to the issue, is apparent. They related to the speed of the car, to the question of its size and whether it was crowded or not, to the question whether the plaintiff could have kept up his feet without a foot-rest, and to the question of the condition of the cattle-guard. It is an elementary principle of the law of evidence that if a witness is to be impeached, in consequence of his having made, on some other occasion, different statements, oral or written, from those which he makes on the witness-stand, as to material points in the case, his attention must first be called, on cross-examination, to the particular time and occasion when, the place where, and the per-

son to whom he made the varying statements. In no other way can a foundation be laid for putting in the impeaching testimony. In the present case, it is apparent that the views of the court, as set forth in the bill of exceptions immediately after the exclusion of the first question which is above stated to have been excluded on the cross-examination of the witness Jerry Artery, must have been founded, not only upon what had at that time transpired, but also upon the subsequent proceedings at the trial, and were the views of the court upon additional and kindred questions which arose in the case, because, at the time such first question was asked upon cross-examination and excluded, it had not yet appeared in evidence under what circumstances the written statement was made by the witness. Moreover, it was stated by the court that the written statements of the witnesses "were sought to be used not alone as a means of impeaching the witness, but as evidence of the matters therein recited;" whereas, when the statement signed by the witness Jerry Artery was offered in evidence and excluded, it was distinctly offered "for the purpose of impeachment," and it is not otherwise stated in the bill of exceptions that it was offered for any other purpose; and, in excluding it, the court excluded it as so offered. We think the circuit court erred in laying it down as a rule that a written statement signed by a witness and admitted by him to have been so signed, cannot be used in cross-examining him as to material points testified to by him; and in announcing it as a further rule that the only way to impeach a witness by showing contradictory statements made by him is to call as a witness the person to whom or in whose presence the alleged contradictory statements were made. The foundation must be first laid for impeaching a witness, by calling his attention to the time, place, and circumstances of the contradictory statements, whether they were in writing or made orally; and the court, in the present case, excluded that from being done. The written statement having been presented to the witness, and he having admitted that what purported to be his signature to it was his signature, it was perfectly open to him to read it, and he could have been inquired of as to the circumstances under which it was taken down

and signed, so as to advise the jury as to its authenticity, and the credit to be given to it. The bill of exceptions does not show that the plaintiff's counsel asked the witness to read the statement, or asked the court to have it read to him, or that the witness did not read it, or did not have it read to him. The exclusion of the first question put to him and excluded, namely, "Is that statement correct?" did not refer to the entire written statement, but to the statement in it as to the speed at which the car was running. That inquiry was directly pertinent to the issue that was being tried.

The rule of evidence invoked by the plaintiff, and laid down in *The Queen's Case*, 2 Brod. & B. 284, 288, is that if, on cross-examination, a witness admits a letter to be in his handwriting, he cannot be questioned by counsel as to whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read as the evidence of the existence of the statements. This principle is not applicable to the present case, because the plaintiff did not take the objection that the whole statement was not, but should have been, read as evidence; and the court, with the assent of the plaintiff, excluded it from being read in evidence.

The case of *Railroad v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. Rep. 118, is not in point. In that case, which was a suit against a railroad company to recover for personal injuries received by an accident to a train, a written statement as to the nature and extent of the injuries, made by the plaintiff's physician while treating him for them, was held not to be admissible as affirmative evidence for the plaintiff, even though it was attached to a deposition of the physician, in which he swore that it was written by him and that it correctly stated the condition of his patient at the time referred to. The question was not one which arose on the cross-examination of a witness or in regard to his impeachment.

Nor was the present case one involving the well-established proposition, that incompetent questions are not allowable on cross-examination in order to predicate upon them an impeachment or contradiction of the witness. The judgment is reversed, and the case is remanded to the circuit court, with a direction to grant a new trial.

In re SNELLING'S WILL.

(32 N. E. 1006, 136 N. Y. 515.)

Court of Appeals of New York. Jan. 17, 1893.

Appeal from supreme court, general term, Second department.

Application for the probate of the will of Mary Snelling, deceased. Probate was contested by Mary Gorden and others, on the ground, among others, of incapacity of testatrix to execute a will by reason of advanced age, impaired faculties, and undue influence. From a judgment of the general term (17 N. Y. Supp. 683) affirming a decree of the surrogate's court admitting the will to probate, contestants appeal. Reversed.

L. R. Beckley, for appellants. Thomas Young, for respondents.

O'BRIEN, J. The will of Mary Snelling, who died in the year 1890, was admitted to probate, after a contest before the surrogate, which was instituted by her nephews and nieces, her only next of kin, on the ground of incapacity and undue influence. She was about 84 years of age, and possessed of a small personal estate, which she bequeathed to the persons, husband and wife, with whom she lived at the time of the execution of the will, which was but a few months before her death. The property came to her from her husband, who died in 1885. Subsequent to his death she lived with various persons in the neighborhood as a boarder, and during this time it appears that she made several other wills in favor of parties with whom she lived or boarded for short periods of time. Her management of the property, and the frequent change of purpose on her part in disposing of it by will, from time to time, in favor of different persons with whom she temporarily resided, and to whom she was more or less attached for the time, would seem to indicate that she had no fixed plan with reference to her estate, and possessed no great intelligence in business affairs. Still it was not shown conclusively that she lacked the capacity necessary in a person of her age and condition in life to dispose of her property by will, or that the will in question was the result of undue influence. The fact that the deceased was a woman of advanced age, somewhat enfeebled in body and mind, and that she gave her property to strangers, instead of her collateral relatives, from motives of gratitude or personal attachment, does not show that she was wanting in intelligence sufficient to comprehend the condition of her property and the scope and effect of the testamentary provisions. So long as her mental powers enabled her to understand and appreciate the amount and condition of her property, and to comprehend the nature and consequences of her act in executing the will, she was at liberty to dispose of her own in such manner

as seemed best to her, providing the disposition was her own free act. What the law terms "undue influence" is not established by proof tending to show that the testator acted from motives of affection or gratitude, though the objects of her bounty were strangers to her blood. The influence or moral coercion, or by whatever other term designated, must be such as to overpower the will of the testator, and subject it to the will and control of another, in which case it assumes the character of fraud. *Horn v. Pullman*, 72 N. Y. 276; *Clapp v. Fullerton*, 34 N. Y. 190; *Hollis v. Theological Seminary*, 95 N. Y. 166; *Marx v. McGlynn*, 88 N. Y. 370.

The evidence given upon the trial before the surrogate, viewed in the most favorable light for the contestants, was conflicting; and the findings that the deceased was possessed of sufficient capacity to make a will, and that the will was not the result of undue influence, are conclusive upon us with respect to the objections made against its probate. But the record discloses certain rulings by the surrogate in the course of the proceedings before him which, in view of the nature of the questions involved in the trial, cannot be overlooked. On the hearing two witnesses were produced by the contestants for the purpose of sustaining the objections made to the probate of the will, who testified at great length to various acts, conversations, and transactions of the testatrix, tending to establish undue influence and incapacity. This testimony extended over some years prior to the execution of the will, and much of it had no bearing upon the issues, as may well be inferred from the fact that it covers over 50 printed pages in the record. The proponents then called two physicians, who both testified that they had read the whole of the testimony of the two witnesses referred to above, giving the names of these witnesses, and to each of them in succession the following question was propounded: "Assuming their testimony to be true, and basing your opinion upon such testimony, what would you say as to the mental condition of Nancy Snelling, say in June, 1890?" This question was objected to by the counsel for the contestants, and, while the form in which the objection was made is quite inartistic, there can be no doubt as to what was intended, and we think it was sufficient to challenge the competency of the testimony sought to be elicited. The surrogate overruled the objection, and an exception was taken. The witness in each case then answered: "I should say she was perfectly sane." It is needless to enter upon any reasoning or discussion to show that this question was improper, as this court has more than once condemned this method of eliciting opinions from experts. *Reynolds v. Robinson*, 64 N. Y. 589, 595; *People v. McElvaine*, 121 N. Y. 250, 24 N. E. 465; *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696. And it would be difficult to imagine a plainer breach

of the rule than is presented by the question propounded to the witness in this case. The principle is not changed by the circumstances that all the testimony embraced within the sweeping terms of the question was before the court, or by the fact that the mass of testimony upon which the opinion was based came from witnesses of the opposite party. The necessity of a specific question, at the time of the examination of the witnesses, covering all the facts, or assumed facts, upon which the opinion of the expert is required, is as apparent in such a case as in any other.

One of the subscribing witnesses to the execution of the will was a neighbor of the persons, husband and wife, in whose favor the will was made, and she attended at the time the will was executed, at the request of the wife, who was one of the beneficiaries under the will. About the time of the hearing upon the contest before the surrogate this subscribing witness was visited by a woman who, under an assumed name, and without disclosing her real purpose, had been procured by the contestants or their counsel to elicit admissions from her for use upon the trial. The subscribing witness, after having testified to what took place at the execution of the will, and that the testatrix was at the time apparently rational, was subjected to a long cross-examination with reference to the interview with the visitor above referred to, for the purpose of laying a foundation for impeaching her testimony. Many of the questions put to the witness in the course of this exceedingly prolix and discursive examination were properly excluded by the surrogate. She was asked, however, in substance, if Mrs. Cook, who was one of the beneficiaries under the will, and interested in its probate, and who had procured her to attend as a witness to the will, had not promised her money or some reward in the case, and she answered the question in the negative. Subsequently the woman who sought the interview in the interest of

the contestants was called as an impeaching witness, and in various forms was asked if the subscribing witness had not so stated in the interview, and other questions tending to impeach her, which were excluded under exception. The interest which a witness has in the subject of the controversy is a material inquiry, as it bears upon the question of credibility; and where a witness has received, or has been promised, any reward for giving testimony in a case, the fact may be shown upon cross-examination, and, if denied, admissions or declarations out of court to that effect may be proved. The relations which the witness bears to the case are so far relevant to the issue as to admit proof of contradictory statements by way of impeachment, when the proper foundation is laid. 1 Greenl. Ev. § 450; *Newton v. Harris*, 6 N. Y. 345; *Starks v. People*, 5 Denio, 106. Many of the questions propounded to the impeaching witness were so framed that their purpose or meaning was not quite clear, or they were so intermingled with other matters that they were properly excluded; but with respect to the interest which the subscribing witness had in the establishment of the will, the contestants were not permitted to make such inquiry as they were entitled to. The very questionable methods used to procure the impeaching testimony might well affect its credibility with the surrogate, but could not affect its competency. An error in admitting or excluding evidence in such a case is not sufficient to reverse the decree of the surrogate, unless it appears that the party against whom the ruling was made was necessarily prejudiced thereby. Code, § 2545. The rulings referred to related to important testimony in the case, and, at least in some degree, must have been prejudicial to the contestants. For these reasons, the judgment of the general term and the decree of the surrogate should be reversed, and a new trial granted; costs to abide the event. All concur.

WELCH v. STATE.

(3 N. E. 850, 104 Ind. 347.)

Supreme Court of Indiana. Dec. 15, 1885.

Appeal from circuit court, Monroe county.

Landen & Miers, for appellant. J. E. Henley, for appellee.

MITCHELL, J. The indictment in this record charges, with proper formality, that on the fourth day of January, 1885, William Welch did feloniously, etc., kill and murder one Louis Fedder, by then and there feloniously, etc., "striking him, the said Louis Fedder, upon his head with a dangerous and deadly weapon, to-wit, a large heavy club, which he, the said William Welch, had and held in his hands." The only objection made to the indictment is that, by the omission of the words "then and there" after the name of the accused, as last above set out, it fails to allege that the defendant had the club in his hand at the time of the beating and striking. Within the ruling in *Dennis v. State*, 2 N. E. 349, there is no force in this objection.

The accused was found guilty of murder in the first degree, and his punishment fixed at imprisonment for life. His conviction rests largely, if not entirely, upon the testimony of one Matthew James, whose evidence relates wholly to alleged confessions or admissions made by the defendant to him. Besides the testimony of James are some criminalizing circumstances of more or less weight.

The evidence of the alleged confession, as detailed by this witness, is not altogether free from suspicion; and the circumstances under which it is said to have been made, and the not altogether unblemished reputation of the witness, as it is made to appear in the record, detract somewhat from the force and reasonableness of the confession as related by him. Notwithstanding this, considering the other circumstances which appear, since the jury have passed upon it, we should hesitate to disturb their finding on the evidence. The witness testified that the defendant made admissions to him, indicative of his guilt, in the presence of Andrew Cooper, and Charles Young. Both of these persons were called as witnesses for the defense, and both denied having heard anything of the kind testified to by James.

Cooper, having testified on his direct examination that he heard no confession made by the defendant to James, and no talk between them about the murder of Fedder, was asked, on cross-examination by counsel for the state, this question: "I will ask you if, in the barber shop of William Profit here in Bloomington, you did not say there that morning that you knew Bill Welch was the man that killed Louis Fedder?" To this question the appellant objected, for the reason that it was asking the witness for an opinion expressed by him out of hearing of defendant, and was not asking for a fact,

and was not a cross-examination, which objection was overruled, and defendant excepted, and the witness answered, "I did not." The state then asked the witness, "And if you did not say there that you were willing to bet \$250 that Bill Welch was the guilty man?" To this question the appellant again objected, for the reason stated. The objection was again overruled and the witness answered, "I did not." The state then called William Profit, and asked him the following question: "State to the jury whether you heard him [Andy Cooper] make the remark that 'William Welch or Bill Welch is the man who murdered old man Fedder. I am not guessing at it; I know it.'" To this the appellant objected, for the reason that the question was illegal and incompetent, and was hearsay evidence, and was an effort to impeach a witness on irrelevant and immaterial matter, and that the question referred to the opinion of an outside party; which objection the court overruled, and appellant excepted, and the witness answered: "Yes; he said that." The state then asked the witness the following question: "I will ask you if he said then, at the same time and place, 'I will bet,' or 'I am willing to bet, \$250 that he is the man?'" To which question the appellant again objected, for the same reasons, which objection was again overruled, and defendant excepted, and the witness answered: "Yes, sir; he said that." The same question was asked the witness Harry Innes, by the state, to which the appellant objected, for the same reasons. These rulings of the court were presented, among others, as causes for a new trial.

We know of no principle or authority upon which to maintain the rulings of the court in admitting the testimony of Profit and Innes. The conversation about which inquiry was made of Cooper on cross-examination was so remotely, if at all, connected with the subject of his direct examination, and of the matter in issue, that the rule was put to its utmost tension in allowing the question to be asked him, over the defendant's objection. *McIntire v. Young*, 6 Blackf. 496. As, however, if the witness had admitted that he made the declarations imputed to him by the cross-examining question such admission might have formed the basis for further inquiry as to the sources of his knowledge, or the grounds upon which he based his opinion of the guilt of the accused, with a view of driving him ultimately to an admission that he heard the alleged confession, we think it was within the discretion of the court to allow the question. Having denied the imputed declarations, we think the state was bound by the denial. The subject about which the witness was inquired of was new, and collateral to the main issue. *Seller v. Jenkins*, 97 Ind. 430. It did not come within the rule that a witness may be shown to have made statements out of court inconsistent with his testimony given upon the trial. The con-

versation or declarations imputed to him had no relation, except by argument or inference, to the testimony given by the witness in his examination in chief. They were not contradictory of his testimony as given, nor were they inconsistent with it so as to become the subject of an impeachment. 1 Whart. Ev. §§ 558, 559; *Seller v. Jenkins*, supra.

This case is complete in its analogy with that of *People v. Stackhouse*, 49 Mich. 76, 13 N. W. 364. In that case a witness was examined on behalf of the accused, who was on trial for the crime of arson. On cross-examination she was asked if she had not said to certain persons named, on the night the accused was arrested, that she always did suspect that he did burn the mill. Having denied the imputed conversation, two witnesses were called who testified that she had so stated. Reversing this ruling, the court said: "The opinion or suspicions of the witness out of court, although inconsistent with the conclusion which the facts which she testified to on the trial would warrant, cannot be made the basis of an impeachment. This is so firmly settled by the authorities that the question cannot be considered an open one."

Whether the matter inquired of on cross-examination, and proved by the state in impeachment of Cooper, was collateral to the main inquiry or not, is determined by this inquiry: Would the prosecuting attorney have been permitted to introduce it in evidence as part of the state's case? If he would not, it was collateral. If it was collateral, it was not competent to contradict it. 1 Whart. Ev. § 559; *George v. State*, 16 Neb. 318, 20 N. W. 311; *State v. Townsend* (Iowa) 24 N. W. 535; *Sumner v. Crawford*, 45 N. H. 416; *Moore v. People*, 108 Ill. 484.

In 1 Greenl. Ev. § 449, the rule is stated thus: "And if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but it is conclusive against him."

In 1 Starkie, Ev. § 200, the author says: "It is here to be observed that a witness is not to be cross-examined as to any distinct collateral fact for the purpose of afterwards impeaching his testimony by contradicting him."

In Whart. Ev. § 559, the learned author says: "In order to avoid an interminable

multiplication of issues, it is a settled rule of practice that when a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question."

The ruling of the court in admitting this evidence, and other rulings admitting evidence of like character, was such error as must reverse the judgment.

In the fifth reason assigned for a new trial is also included an alleged error of the court in excluding the evidence of James Kelley, a witness for appellant. When James Kelley was on the witness stand the counsel of appellant asked him to state what he knew of the intention of the defendant to leave Bloomington, and for what purpose, etc. To this question the state objected for the reason that it was hearsay. Counsel for the defendant stated that the defendant wanted to show that defendant and this witness had a conversation as to his going away to the Air Line Railroad to get a job of work, instead of going away to avoid a prosecution; that the defendant made his going away public; and that he made known his intention and purpose to five or six other witnesses, and that he went to get work, and got work. The court sustained the objection, and appellant excepted. Concerning the evidence thus proposed, it may be said the record fails to show that the state had introduced evidence tending to show that the defendant left Bloomington under circumstances which might indicate a purpose to avoid arrest and prosecution. Until some evidence was introduced by the state upon which a claim of flight or evasion of arrest might have been based, the evidence offered was immaterial. It may have been excluded for that reason. We need not decide whether, under any circumstances, such evidence is competent. *Hamilton v. State*, 36 Ind. 280; *Austin v. Swank*, 9 Ind. 109; *Boone Co. Bank v. Wallace*, 18 Ind. 82.

The application for a new trial, so far as it was asked on the ground of newly-discovered evidence, need not, in view of the fact that, for the reasons already given, the judgment must be reversed, be further noticed. Judgment reversed, with directions to the clerk to make the proper order concerning the further custody of the defendant.

ANEALS et al. v. PEOPLE.

(25 N. E. 1022, 134 Ill. 401.)

Supreme Court of Illinois. Nov. 1, 1890.

Error to circuit court, Adams county; WILLIAM MARSH, Judge.

Indictment for assault with intent to commit murder. The instructions referred to in the opinion were as follows: "The court instructs the jury that in determining the question whether the defendants William Aneals and Louis Stormer were or were not at another place, or at other places, at the time of the alleged assault, they should not be governed alone by the testimony of the witnesses introduced to prove an *alibi*, but that it is the duty of the jury to consider all the evidence in the case before them, and unless the jury, after considering all the facts and circumstances in evidence before them, have a reasonable doubt as to the presence of the defendants William Aneals and Louis Stormer at the home of James Knox at the time of the assault, that then the jury should not permit the defense of an *alibi* to avail said last-named defendants." "The court instructs the jury that the theory of an *alibi* in this case is that the defendants were so far removed from the scene of the alleged assault at the time of its commission as to make it impossible that they could have committed it; and even although the jury may believe from the evidence in the case that the defendants were at other and different places than the scene of the assault on the same evening such assault, if any, was made, nevertheless, if the jury further believe from the evidence in the case beyond a reasonable doubt that the defendants could have reasonably been at the place of such assault at the time thereof, and also at such other place or places, on the same evening, and at the time or times mentioned by the witnesses in the case, that then the defense of an *alibi* cannot avail the defendants."

John H. Williams and Charles M. Gilmer, for plaintiffs in error. George Hunt, Atty. Gen., for the People.

SHOPE, C. J. At the May term, 1889, of the Adams circuit court, Francis Asbury Aneals, William Aneals, and Louis Stormer were indicted for an assault upon James Knox, with intent to commit murder. At the September term, 1889, the trial resulted in a verdict of guilty, fixing the term of Asbury and William Aneals, severally, at 18 months in the penitentiary, and the defendant Stormer at 1 year. A motion for a new trial was sustained as to Asbury Aneals, but overruled as to the other defendants, and they were severally sentenced on the verdict. They prosecute this writ of error.

The first contention is that the verdict should have been set aside because the proof failed to sustain it. No question is made that there is ample proof of the *corpus delicti*. The only question of fact is as to the identity of the persons who committed the assault. On April 27, 1889, about 8 o'clock in the evening, while James Knox and his family were at the

supper table, two masked men entered the house, and saying only, "Hold," fired two shots at Knox from a revolver, each firing one shot, one taking effect in the nose of Knox, the other missing him and passing out through a window. The assailants then backed out of the house, drew shut the door, and disappeared. There were present James Knox, his wife, Samuel Knox, a brother of James, Miss Agnes Lagee, and Miss Hattie Wibble. The latter two had just risen from the table. Miss Lagee was within four feet, and possibly nearer the smaller, of the two assailants. One of the assailants was considerably larger than the other. The larger one came in first, but the smaller one stepped furthest into the room. Samuel Knox was 10 or 12 feet from the door at which the assailants entered, which was on the south side of the room, winding the clock which hung on the west wall of the room. James Knox was unable to identify either of the assailants, and unable to give any description of them, except that the smaller of the two was a man from 5 feet 6 to 8 inches high, weighing 130 or 140 pounds, "longish neck," shoulders not broad but square. Miss Lagee, who was nearer than the others, says that one was quite a little smaller than the other in size, build, and height; that she noticed the eyes of the smaller one particularly through his mask. She also noticed that the hair of one of the assailants was dark, and the other light. On the following Saturday morning, this witness and others went to Aneals' and Stormer's to see if they could identify any one. She says that Stormer's build and size resembled very much the size and build of the smaller of the assailants. He had light blue eyes, and a peculiar stare about them "that I noticed particularly that night." She also states that the eyes were rather small, and through the mask they seemed rather round than oval. The larger of the two men had dark eyes and hair. Both wore light, brown-gray suits, and hats the same color. The larger one had a large hat; the other a small one. The larger one had square shoulders, was firmly built, and straight. She testified that the description of the larger one answers to that of William Aneals "very well." She was unable to recognize any one as the assailant, but testified that the two defendants, William Aneals and Louis Stormer, resembled the parties who made the assault. On the motion for a new trial, she filed an affidavit stating that she did not believe that the defendants were the assaulting parties, and did not intend to be so understood in giving her testimony. Miss Wibble was unable to identify any one, while she agrees with the other witness in the main as to the description of the persons who made the assault. Samuel Knox testified that he had known William Aneals from infancy, and was familiar with his size, form, and general appearance. He describes particularly the clothing and hats of the assailants, and says he saw William Aneals wear a hat like the one described by him, on May 6th, in Quincy. He saw him clearly at the time of the shooting. Saw none of his face but

his chin, and that resembled the chin of William Aneals. He testified that he thought he knew these men, and was satisfied from what he saw that William Aneals was one of them. On cross-examination of this witness, much occurred that might very properly weaken the force of his testimony.

It is made to appear with reasonable certainty that no one came out onto the road or public highway in front of the house immediately after the shooting; but back of the house, near the hedge, it was found that two horses had been hitched, and an opening had been made through a rail fence, and that horses had passed through the same going north. The rails had been recently let down, and horses led or ridden over them. On the fence were found prints of horses' feet, and black and bay horse-hair. The horse tracks led in the general direction of where Aneals and Stormer lived; that is, northerly. One of the horses that made these tracks had two shoes behind, and one in front. The other was shod in front only. The large tracks were made by the horse having three shoes. Knox lived on the east side of section 15. To go to Aneals' through the fields would be from a mile and a half to two miles north, and a half mile west. The witness Carroll had been at Ingraham's, substantially a half a mile west from William Aneals', and was at the gate "at the corner" about 200 yards from Aneals' house, where the road turns north to Bloomfield. At about 8:30 o'clock he saw two persons on horse-back coming from the south, and which would be from the general direction of Knox's going north. At the corner mentioned the riders turned east. He thought he recognized one of them as the defendant William Aneals, and called to him by name, but received no reply. He also thought that he recognized the horse next to him, the larger of the two horses, and it was, as he thought, the horse that William Aneals had shortly before that purchased of Louis Fogle. It was moderately dark, and the moon not shining. The persons were riding in a "fair lope." Two witnesses examined the horse tracks found near Knox's house, and in the field. Subsequently, the witnesses Carroll and Hunter examined William Aneals' horses, and found a large mare belonging to him, with two shoes behind and one in front, which Carroll testifies was the Fogle mare, and whose feet, they testify, compared exactly with the larger tracks found at the fence and in the field near Knox's house. One witness, at least, went to Asbury Aneals' barn, and found a horse, shod in front, and bare behind, the tracks of which were apparently the same as the tracks of the other horse found back of Knox's house, and in the field. The horse-hair found at the fence was of the same general color as the hair upon the legs of the two horses mentioned by the witnesses. On Thursday following the shooting, Carroll saw the Fogle mare at William Aneals', and the hair had been cut off her legs, when, however, does not appear. The evidence shows that, a short time prior to the assault, Asbury Aneals and

James Knox had had some difficulty over local political affairs. Much ill feeling seems to have been engendered at and before the caucus, which nominated both of these men for office; Aneals for supervisor, and Knox for assessor. Knox was elected, and Aneals defeated. William Aneals is the son of Asbury; Louis Stormer lived near the Aneals, and, at the time of the assault, was in William Aneals' employ. About a week after the election, the witness Altenheim testifies that Asbury Aneals said, when it was remarked that Mr. Knox was elected, that "he would never serve." The witness Gould, who claims to have been present, corroborates the statements of Altenheim, which are denied by Aneals. The defense was an *alibi*.

In respect of the evidence, of which the foregoing is an imperfect epitome, it must be said the jury heard the descriptions given of the assailants, particularly of the one alleged to have been Stormer, and had the opportunity of comparing it with the defendants as they appeared on the trial. They saw the witnesses, could observe their demeanor, and thereby judge of the weight and credit due to each; all of which is denied to us. If the description of the smaller of the two assailants, in connection with the other facts and circumstances proved, satisfied them beyond a reasonable doubt as to his identity, they were justified in finding him guilty. In respect of the defendant William Aneals, if they believed his identification by the witnesses, Samuel Knox and Carroll, was sufficiently certain, when taken in connection with the very strong circumstances proved tending to connect him with the commission of the offense, to remove all reasonable doubt as to his identity, they were likewise justified in their verdict, unless a reasonable doubt of the guilt of said defendants, or one of them, was created by the evidence of good character of the accused, and of that tending to prove an *alibi*. No motive in respect of the defendant Stormer is shown, unless it can be traced to the fact that he was the friend of, and working for, the Aneals. In respect, however, of William Aneals, it cannot be said that evidence of motive was altogether wanting. James Knox had declined to run for office on the ticket with his father, and the brother of said Knox had stated in open caucus that he was ashamed to have his brother run on the same ticket with Asbury Aneals. Both, however, ran, and Aneals was defeated, and Knox elected. It seems that Asbury Aneals was much incensed. Knox was also a school director, and Asbury Aneals said, to the witness Whitler, that he wanted Knox out; he wanted "the scoundrel out." In view of the facts and circumstances proved, it cannot be said that there was not sufficient evidence upon which to predicate a verdict of guilty, if the jury believed it to be true. And, as to the *alibi*, it must be said, when the evidence is all considered, that the defense is not established, and the jury were, we think, justified in concluding that the presence of the plaintiffs in error at the store in Bloomfield, at from about 8 o'clock to about 10 o'clock, on the night of the assault, was not neces-

sarily inconsistent with their being present at the time and place of the assault. Perhaps the weight of the testimony in support of the *alibi* is that William Aneals came to Davis' store in Bloomfield about 8 o'clock,—some of the witnesses for defendants, however, put it later,—and that Stormer reached the store 5 to 10 minutes later than Aneals. To illustrate: John Carlin came to the store between 7:30 and 8 o'clock, and says: "I saw Aneals when he came in. I was there quite a while before he came in;" and further says: "To the best of my opinion, it was somewhere about 8:30 when I first saw William Aneals at the store." Henry Nedick, who was at Davis' store on the evening in question, was produced by the plaintiffs in error, and lived about three-fourths of a mile from Bloomfield. He says: "I looked at the clock before I went. It was just 8 o'clock. It struck while I was looking." He then says he started with a little boy, and walked to the store, taking about 15 minutes' time. Aneals was then at the store, and Stormer came about 10 minutes later, which would indicate that Aneals had just arrived. The difference of time of the coming of Aneals and Stormer, as shown by all the proof, would indicate that Aneals, as before said, had just arrived at the store, so that it is possible, if not quite probable, in view of all this testimony, that the arrival of Aneals was later than 8 o'clock. The distance from Knox's house to Aneals', by the road that Carroll saw the parties mentioned by him coming, would be from $2\frac{1}{2}$ to 3 miles; and from Aneals' to the store, about three-fourths of a mile; and from Stormer's to the store, but a few hundred yards. When the persons described by Carroll passed him, the horses were on a "fair lope." It is apparent that if these plaintiffs in error were escaping from the scene of their crime, but a very few moments would be required to cover these distances. It appears, from the testimony introduced by plaintiffs in error, that they ate supper together at William Aneals' house, and Stormer's presence is unaccounted for, by any evidence, save that of plaintiffs in error, from that time until he reached the store, except from 2 to 6 minutes that he was at his father's, before walking the five or six hundred yards from his father's house to the store. It is also to be remembered that no one at Knox's pretends to have looked at any time-piece, or to give any more definite statement of the time than that it was about 8 o'clock. No data is furnished from which that conclusion is reached. And, taking into consideration the time intervening before any person left the house to send for a doctor, the time they were gone when they did go, and the distance traveled, in connection with the testimony of the physician that he was called at 9 o'clock, started to Knox's 15 minutes thereafter, and arrived there at about 10 o'clock, or a few minutes later, would seem to very clearly indicate that the assault might have been committed some time before 8 o'clock. Some of the persons had just risen from the supper table, and Knox and his wife were still at the table when

the assault occurred. On the one side, those witnesses who seemed to have looked at time pieces place the arrival at the store in Bloomfield later than 8 o'clock; while on the other no one pretends to have known the exact time of the assault. It is very clear that a half hour, or even less, would have sufficed for the commission of the offense, and the arrival of the plaintiffs in error at the store in Bloomfield. We cannot say, in view of this evidence, and the circumstances proved, that there was necessarily such inability for the plaintiffs in error to commit the offense as would create a reasonable doubt of their guilt.

It is objected the court erred in not permitting the plaintiff in error to show, by the witness Gould, that the witness Hunter offered him \$50 to testify to certain facts, after Hunter was informed that the supposed facts were not true. No foundation had been laid in the examination of Hunter, who was a witness for the people, and the evidence was therefore improper, and the court properly excluded it. For the same reason, like questions asked of the witness Dudley, and others, were held to be improper, and objection thereto sustained. In like manner, the plaintiffs in error produced Mr. Judy, who was foreman of the grand jury, and he was asked if Samuel Knox did not testify before the grand jury, in respect of certain material matters, in a particular way; that is, as to whether or not he did not then state that he did not know, and could not recognize, either of the men making the assault, etc. No foundation whatever was laid, in the testimony of Knox, for the introduction of this testimony. And precisely the same is true in respect of the offered testimony of the witness Percell and others. No good purpose can be subserved by noticing these objections in detail; they all rest upon the same basis, and the ruling of the court was for the same reason proper. It is not proper to call witnesses to contradict or impeach a witness in respect to matters occurring out of court, as by showing that he has made some statement out of court inconsistent with his testimony, unless the attention of the witness is first called to the time and place of the alleged statement or declaration, and he is afforded an opportunity for explanation in respect thereof. This rule is so familiar as to require the citation of no authorities in its support.

Numerous other objections are made in respect of the rulings of the court on the introduction of testimony, some of which may properly be considered. The defendants produced a large number of witnesses, who testified to the previous good character of the defendants,—some to all, and others to one or more of them,—of whom the state's attorney inquired if they had not heard of an assault by Asbury Aneals, who it will be remembered was also on trial, upon one Sigsby; and whether they had not heard of his being accused of poisoning Sigsby's horses. Some of these witnesses stated they had heard of the supposed assault on Sigsby, and others that they had seen the occurrence. Thereupon, counsel for defendants insisted upon

their right to have the witnesses state what did occur between Aneals and Sigby, to which the court sustained an objection, and, we think, properly so. To have permitted the witnesses to detail what occurred at that time would have necessitated a trial of a purely collateral question. Trials would become interminable. It may safely be stated that there is neither reason nor authority for the position of counsel. Some of the witnesses said they had heard of the charge of poisoning, after the assault in this case; that it was first published in a newspaper in Quincy after the arrest of the defendant. The defendants then offered to prove that it was published at the instigation of the witness Hunter, to which objection was made, and objection sustained. No foundation had been laid in the examination of Hunter for this character of proof. Moreover, the testimony in respect of both the assault and poisoning related only to the defendant Asbury Aneals. In no way was the defendant William Aneals or Stormer connected with either of said matters, or the rumors in respect thereof. In no event would it be error of which they could complain. We are of opinion that it would have been proper to have permitted the defendant Asbury Aneals to answer as to whether he and the witness Altenheim were on friendly or speaking terms at the time referred to by Altenheim, when he says Aneals said that Knox would never serve as assessor, as tending to show the probability or improbability of his having made the statement imputed. But the defendants received the full benefit of Asbury Aneals' denial of the statement attributed to him, and his testimony could not have been made stronger by this additional statement. It is impossible that the defendants could have been prejudiced by this ruling.

It is urged with great pertinacity that the defendants should have been permitted to show as a substantive fact that the witness Hunter had ill feeling and hatred towards the defendants, and was actuated by corrupt motive. The witness Hunter admitted on cross-examination that a reward of \$1,000 had been offered for the arrest and conviction of the assailants, and he was then asked, "Is it not a fact that your interest in it was of the money reward which was offered?" and he answered, "Of course, if I get the right parties. If I get the right parties I expect to get the reward." He then testified that he had no ill feeling towards any of the defendants, that he had not talked slightly or bitterly about them, had not called them names, or used expressions of that kind. He was asked if he had not made such statements to Mr. Colburn, and he said, "No." As to matters purely collateral, where the party calls them out on cross-examination, he is bound by the answer of the witness, but not so in respect of matters relevant and material to the issue being tried. The feeling and disposition of the witness towards the party is held to be relevant and material; and, on cross-examination, it is competent to test the witness in respect of his feeling, and if he has not done acts, or used expres-

sions, showing hatred or ill will against the party against whom he is testifying, and if he denies the same, to introduce contradictory evidence by way of impeachment. 1 Greenl. Ev. § 450; *Phenix v. Castner*, 108 Ill. 207, and authorities cited. But the rule in respect of the contradiction of the witness in such matters is the same as in respect to any other matters material and relevant to the issue. Before witnesses can be called to show that statements have been made out of court, inconsistent with those testified to at the trial, it is necessary, as before said, to lay the proper foundation by calling his attention to the time, place, and person involved in the supposed contradiction. Then, if he denies having made the declaration, or done the act imputed, the contradictory evidence becomes proper. This we understand to be the uniform practice, and to which we are not aware of any exception. 1 Greenl. Ev. § 462; *The Queen's Case*, 2 Brod. & B. 313; *Conrad v. Griffey*, 16 How. 38. As before stated, as respects the witness Percell and others, so in respect to the witnesses Colburn and Gould, no proper foundation is laid for the offered testimony, although the attention of counsel was called, during the examination of Hunter, to the necessity thereof, by the court, and of which they now complain. In view of the fact that the court called the attention of counsel to the omission, and the many interrogatories put to Hunter upon the subject of his feeling, we cannot say that it was an abuse of the discretion lodged in the court to refuse to permit Hunter to be recalled for the purpose of laying the foundation for the introduction of other and different matters, or statements alleged to be made at other times and places. Hunter had been asked respecting a statement at Colburn & Baker's store, and if he had not used certain language. The witness testified that he had not used that language; but, in a conversation before Urban's saloon, something had been said by Hunter. Upon objection being sustained, defendants asked to recall Hunter to lay the foundation for the conversation at Urban's saloon, which the court refused to permit. Ordinarily, the discretion should, undoubtedly, have been exercised; but, as before said, a reasonable limit had been allowed, the attention of counsel had been called to the rule, which they seemed to regard as an unjustifiable interference on the part of the court, and we cannot say that there was any abuse of discretion.

We have thus carefully gone through the evidence, and the many objections urged, for the reason that the case is close, in some respects; and if any error had intervened prejudicial to plaintiffs in error, or that might have unduly prejudiced them before the jury, however slightly, we should have been disposed to reverse the judgment. The character of plaintiffs in error, previous to this charge, was shown by a greater or less number of witnesses to have been good; and such evidence was competent to be taken into consideration by the jury in determining their guilt or innocence. The probative force of such evidence in each case must always depend up-

on the nature and character of the inculpatory evidence; and it may, and no doubt often does, of itself properly create such a reasonable doubt in the mind of the jury as will justify an acquittal. But it is to be remembered that the weight to be given to the evidence is peculiarly within the province of the jury; and, unless we can say that the finding is palpably wrong, we ought not to interfere upon the facts alone. This we cannot say in this case. Not only may the jury consider the evidence of good character upon the question of guilt, but, if they feel constrained to find the defendant guilty, it is proper to consider the same in mitigation of punishment. And it would seem that the jury have done so in this case.

The jury were fairly and fully instructed as to the law of the case, to which there is no material objection urged. Objection, however, is made to the instructions given for the people, printed on page 65 of the abstract. The objection is "that the reasonable doubt in each of them ought to be as to the guilt of the defendants." The criticism is not warranted. The instructions relate to the question of *alibi*. The jury must believe beyond a reasonable doubt, from a consideration of all the evidence, that the defendants are guilty before they would be justified in so finding. But these instructions did not relate to the question of guilt or innocence strictly. By them the jury were told, in effect, that if, after considering all the facts and circumstances in proof, they had no rea-

sonable doubt of the presence of the plaintiffs in error at the house of Knox at the time of the assault, then the defense of *alibi* had not been made out, and was unavailing. The instructions were entirely proper, and not in conflict with the rule stated.

It is also objected that one of the people's instructions was marked "For defendants," and it is urged that some inference might be drawn therefrom by the jury different from what would have been drawn had it been properly marked "For the people." The contention is without merit. The practice of marking instructions for the one side or the other is pernicious, and should not be tolerated, if thereby inferences are to be drawn by the jury. The instructions should go to the jury as the instructions of the court, and the better practice is to have nothing appearing on the instructions showing at whose instance they are given. But there is nothing here that in any way indicates that any inference prejudicial to the plaintiffs in error was drawn by the jury, or that such could have been the effect. The instruction itself relates to what was proper for the jury to take into consideration, in considering of their verdict, and was eminently proper to have been given at the instance of either party, or by the court itself on its own motion. We are of opinion that no substantial error has intervened, appearing upon this record.

The judgment of the circuit court must be affirmed.

AYERS et al. v. WATSON.

(10 Sup. Ct. 116, 132 U. S. 394.)

Supreme Court of the United States. Dec. 9, 1889.

In error to the circuit court of the United States for the northern district of Texas.

W. E. Earle, for plaintiffs in error. *W. Hallett Phillips*, for defendant in error.

MILLER, J. This is an action of ejectment brought by Watson, the original plaintiff, in the district court for the county of Bell, in the state of Texas, and afterwards removed into the circuit court of the United States for the northern district of that state. It was twice tried before a jury, which failed in each of these trials to come to an agreement. It was tried a third time, which resulted in a verdict and judgment for the plaintiff. A writ of error was taken to that judgment, by which it was brought to this court and reversed. The case is reported as *Ayers v. Watson*, 113 U. S. 594, 5 Sup. Ct. Rep. 641. It was thereupon remanded to the circuit court for a new trial, where a verdict was again had for the plaintiff, and the judgment rendered on that verdict is before us for review. The details of the controversy may be found in the report of the case above mentioned. While it was pending in the district court of Bell county the following agreement between the parties was made, which simplifies the case very much: "A. E. Watson v. Frank Ayers et al. It is agreed and admitted by the defendants, for the purpose of this trial, at this term of the court, that A. E. Watson, plaintiff in this cause, is entitled to all the right, title, and interest granted by the state of Texas to the heirs of Walter W. Daws on September 16, A. D. 1850, said land patented being one-third of a league, described in said patent No. 542, vol. 8, and which said land is described in plaintiff's petition; but defendants say that said one-third of a league of land so patented as aforesaid to the heirs of Walter W. Daws is covered by the grant of the government of Coahuila and Texas to Maximo Moreno of eleven leagues of land, as set forth more fully in defendants' petition; which said eleven-league grant is an older and superior title to that of plaintiff's, and the title to which is in the defendants in this cause. X. B. SAUNDERS, W. T. RUCKER, F. H. SLEEPER, and A. M. MONTEITH, Attys for Defendants."

By this agreement it will be seen that the sole question at issue was whether the land in controversy was covered by the 11-league grant to Maximo Moreno. A plat of that survey is found in the bill of exceptions. On the trial, which resulted in the judgment which we are now called to reconsider, and which, as we understand it, was the fourth time the case had been tried by a jury, the defendant introduced the deposition of F. W. Johnson, the surveyor who had made the survey under the Moreno grant. It seems that his deposition had been taken twice in this action, and, though the details of those trials are not before us, it had no doubt been used in them. But prior to the trial which we are now review-

ing he had died. It appears from the bill of exceptions that in these depositions he had been cross-examined by plaintiff's counsel. Plaintiff, in rebuttal to this testimony of Johnson, offered in evidence a deposition of the said Johnson taken in 1860, in a suit between other parties, in which his testimony with regard to the matters to which he testified in the depositions offered by defendant varied materially from these latter depositions. To the introduction of this deposition of 1860 the defendants objected, and, their objection being overruled, took this exception. As we think the judgment of the court below must be reversed on account of this ruling, all that relates to it in the bill of exceptions is here reproduced: "It was admitted by both parties that the upper and lower corners on the river of the Maximo Moreno 11-league grant are extant as called for in the original grant to Maximo Moreno, and their corners are not in dispute. The defendant read in evidence the depositions of F. W. Johnson, taken in 1878 and 1880, in which he testified that he was principal surveyor for Austin's colony.

* * * The first survey made was the Maximo Moreno 11-league survey. This survey was commenced at the point opposite the mouth of the Lampasas river, as called for in the field-notes of the grant, and a line was run thence on the course called for in the grant, the distance called for, the chain being used to measure the distance. The north-west or second corner called for in the grant was thus established by him, the distance giving out in the prairie. 'In running the west line I made an offset to avoid crossing the Leon river, which was about 50 or 60 varas wide. This offset was made soon after leaving the beginning corner, there being a peculiar bend in the river at that point. From the north-west corner thus established the second line was run the course and distance called for in the grant. Several streams were crossed on this line at distances not now recollected, and the north-east corner established on two small hackberries in Cow Creek bottom. From the north-east or third corner so established a line was run in the course called for in the grant to San Andres river. This last line was marked, but not measured, because it was not usual or necessary to measure the closing line.' It was admitted by the defendant that the distance as measured on the ground from the north-east corner to a creek called for in the grant was some four thousand varas more than the distance called for,—that is, the distance is 7,500, instead of 3,500 varas; and on cross-examination, being asked to account for the discrepancy, said the distances called on that line were not measured, but guessed at. No part of the east line was measured. The exterior lines were marked with blazes. The corner trees and bearing trees, where there were such, were marked with blazes, with two hacks above and two below. In answer to a question, on cross-examination, he said that he did not begin the survey at the south-east corner, but he began at the south-west corner, at the three forks, at the mouth of the Lampasas, and actually traced the lines in the order set forth in the field-notes. 'The field-book containing the same, which I kept, I examined,

which I don't remember to examine until a month ago, and as hereinbefore stated.' The plaintiff in rebuttal to Johnson's testimony, as above set forth, it appearing that said Johnson died in 1884, offered to read in evidence a deposition of said Johnson, taken in 1860, in a certain suit then pending in Bell county, Tex., wherein David Ayers was plaintiff and Lancaster was defendant, in which he stated, in answer to a question therein propounded, that he 'began the Moreno survey at the south-east corner, and ran thence northerly. The north line was then run westwardly, and the third, if run at all, was run southwardly to the river. I am of the opinion that no western line was run, but was left open; but the eastern and northern lines were run and measured. It was not usual to measure the closing line.' To the reading of which last-mentioned deposition, proven to be in the handwriting of Johnson, taken in 1860, the defendants objected, upon the ground that the deposition had been taken in another and different cause, between other parties, before the institution of this suit; and, the same witness having testified in answer to interrogatories and cross-interrogatories propounded herein in 1877 and 1880, respectively, it was not competent as original evidence, nor admissible to contradict or impeach the testimony of the witness Johnson, as given in his deposition read by the defendants, notwithstanding the death of Johnson; which objection the court overruled, and admitted the testimony so objected to; to which ruling of the court the defendants then and there excepted, and still except, and the same is allowed as exception No. 1."

A very earnest and able argument is presented to us to sustain this ruling, upon the general ground of the liberality of courts in admitting what would be otherwise called "hearsay evidence" in regard to boundaries, such as tradition, general understanding in the neighborhood, declarations of persons familiar with the boundaries and with the objects on the lines of the survey, and others of similar character. An opinion of Mr. Justice FIELD, delivered in the supreme court of California in 1860, in the case of *Morton v. Folger*, 15 Cal. 277, is much relied on in this case, and it is also said that the courts of the state of Texas have established the same principle, which has thus become a rule of property in that state, which should be followed in this case. If the principles stated in the decision of the California court, and in the decisions of the supreme court of the state of Texas, were indeed applicable to the case before us, we would hesitate very much in reversing the judgment on this ground, and, indeed, should be inclined, on the weight of those authorities, and in the belief that in the main they are sound, to overrule the exception. But the objection in the present case to the deposition of Johnson, taken, in 1860, does not rest upon the ground that it is hearsay testimony, or that it does not come within the general principle which admits declarations of persons made during their life-time of matters important to the location of surveys and objects showing the line of those surveys. Johnson's deposition of 1860, if it stood alone and

was introduced upon the trial of this case for the first time as independent testimony in favor of plaintiffs, might be admissible. It is not necessary to decide that question because such is not the character of the circumstances under which the testimony was admitted. As we have already said there had been three trials of this action, during which Johnson was alive and was a competent witness for either party. All his testimony was given by way of deposition. This only renders the manner of taking it more deliberate, and if it was to be contradicted by anything he had said on former occasions, made it the more easy and reasonable that plaintiff should have called his attention to the former statements which they proposed to use. It will be observed that the plaintiffs did not introduce, or offer to introduce, this deposition of Johnson of 1860 as a part of their case, when it was their duty to introduce their testimony. They, therefore, did not rely on it as independent testimony in their favor. But after Johnson's deposition had been given in the case itself, and he had been cross-examined by the plaintiffs in that deposition in regard to his testimony, and after he was dead and could give no explanation of his previous testimony of 1860, which might show a mistake in that deposition, or give some satisfactory account of it consistent with his testimony in the principal case, this old deposition is for the first time brought forward to contradict the most important part of his testimony given on the present trial. The importance of this matter, as it was presented to the jury, will be readily understood when we revert to the fact that the two southern corners of the survey are established without question, and are found on the San Andres river, and the controversy concerns the question whether the east line and the west line of that survey, which are straight lines almost due north, extend so far north that the northern line between these lines is so far north as to include the survey of Daws, under which plaintiff claims. In the principal deposition of Johnson, as we have seen by the bill of exceptions, he states that this survey commenced at the southwestern corner on the San Andres river, and was run northward the distance called for in the grant, and actually measured by the chain. The north-west or second corner called for in the grant was established by him, the distance giving out in the prairie. From the north-west corner thus established, the second, the line was run for the course and distance called for in the grant, and the north-east corner established on two small hackberries on Cow Creek bottom. From the north-east or third corner thus established the course was run to the San Andres river. This last line was marked, but not measured, because it was not necessary to measure the closing line. In answer to questions on cross-examination, he said he did not begin at the south-east corner, but he began at the south-west corner, and actually traced the lines in the order set forth in the field-notes. He said the field-book, containing these notes, "I kept and examined, which I do not remember to have examined till a month ago, as hereinbefore stated." The deposition offered by

plaintiff states distinctly that he began the Moreno survey at the south-east corner, and ran thence northerly. The north line was then run westwardly, and the third, if run at all, was run southward to the river. And he further says: "I am of the opinion that no western line was run, but was left open, but the eastern and northern lines were run and measured. It was not usual to measure the closing line." It was admitted that the distance as measured on the ground from the north-east corner to a creek called for in the grant was some 4,000 *varas* more than the distance called for, and the witness on cross-examinations in the principal depositions read by the defendant in this case, being asked to account for this discrepancy, said: "The distances called on that line were not measured, but guessed at. No part of the east line was measured." The discrepancy between these two depositions is manifest, and that discrepancy is in a matter which relates directly to the question whether the Moreno grant as it was surveyed included the land embraced within the Daws grant, under which plaintiff asserts claim. If the jury believed in the truth of the depositions of Johnson taken by the defendant in this case, at which he was cross-examined by the plaintiff, it affords the strongest evidence that the Daws claim was included in the lines of the Moreno survey. This deposition is supported by the field-notes and by the reference of Johnson himself to those field-notes a very little while before he gave his deposition. If, on the contrary, the eastern line was the one which was actually run and measured, beginning at the south-east corner of the survey on the San Andres river, then the fact that that line was actually run and measured would probably have a very great influence in the mind of the jury on the question in issue. And, whether this was so or not, the contradictory statements of Johnson under oath might destroy the value of his testimony before the jury.

The circumstances under which the former statements of a witness in regard to the subject-matter of his testimony, when examined in the principal case, can be introduced to contradict or impeach his testimony, are well settled, and are the same whether his testimony in the principal case is given orally in court before the jury, or is taken by deposition afterwards read to them. In all such cases, even where the matter occurs on the spur of the moment in a trial before a jury, and where the objectionable testimony may then come for the first time to the knowledge of the opposite party, it is the rule that, before those former declarations can be used to impeach or contradict the witness, his attention must be called to what may be brought forward for that purpose, and this must be done with great particularity as to time

and place and circumstances, so that he can deny it, or make any explanation intending to reconcile what he formerly said with what he is now testifying. While the courts have been somewhat liberal in giving the opposing party an opportunity to present to the witness the matter in which they propose to contradict him, even going so far as to permit him to be recalled and cross-examined on that subject after he has left the stand, it is believed that in no case has any court deliberately held that after the witness' testimony has been taken, committed to writing, and used in the court, and by his death he is placed beyond the reach of any power of explanation, then in another trial such contradictory declarations, whether by deposition or otherwise, can be used to impeach his testimony. Least of all would this seem to be admissible in the present case, where three trials had been had before a jury, in each of which the same testimony of the witness Johnson had been introduced and relied on, and in each of which he had been cross-examined, and no reference made to his former deposition, nor any attempt to call his attention to it. This principle of the rule of evidence is so well understood that authorities are not necessary to be cited. It is so well stated with its qualifications and the reasons for it, by Mr. Greenleaf in his work on Evidence, (volume 1, §§ 462-464, inclusive,) that nothing need be added to it here except a reference to the decisions cited in his notes to those sections. See, also, Weir v. McGee, 25 Tex.Supp. 32. It will thus be seen that the principle on which counsel for plaintiff in error objected to this deposition of Johnson is not in conflict with the case of Morton v. Folger, 15 Cal. 277, nor with any case to which we are cited, decided by the supreme court of Texas. That ground, as stated in the bill of exceptions, is "that the deposition had been taken in another and different cause, between other parties, before the institution of this suit; and the same witness having testified in answer to interrogatories and cross-interrogatories propounded herein in 1877 and 1880, respectively, it was not competent as original evidence, nor admissible to contradict or impeach the testimony of the witness Johnson, as given in his deposition read by the defendant, notwithstanding the death of Johnson."

We are very clear that the deposition of 1860 was improperly admitted, and its important relation to the issue tried by the jury was such that the judgment rendered on it must be reversed, and the verdict set aside, and a new trial granted. There are other assignments of error, the consideration of which is not necessary in the decision of the case before us, which, with due attention to what we decided when the case was here before, to which we still adhere, may not arise in another trial.

BECKER et al. v. KOCH, Sheriff, etc.

(10 N. E. 701, 104 N. Y. 394.)

Court of Appeals of New York. March 1, 1887.

Charles B. Wheeler, for appellant. Baker & Schwartz, for respondents.

PECKHAM, J. This action was brought by the plaintiffs, as assignees for the benefit of creditors of one Exstein, to recover from the defendant the possession of some personal property, amounting in value to about \$4,000, or, in default thereof, to recover such value. The defendant justified the taking of the property by virtue of a writ of attachment issued to him as sheriff of Erie county in an action in which Victor and others were plaintiffs, and Exstein was defendant, and under which writ the sheriff had levied upon this property as belonging to the said Exstein. The assignment to plaintiffs was made on the seventeenth of October, 1883, and included the property in question. The attachment was, on the fourteenth of November, levied on the property, and, after the plaintiffs in the attachment suit recovered judgment against Exstein, the property was sold on an execution issued thereunder to the defendant. The answer in this action set up these facts, and alleged that the assignment to the plaintiffs was made with the intent, on the part of Exstein, to hinder, delay, and defraud his creditors. The action came on for trial in the superior court of Buffalo, and, after the evidence was all in, the court directed a verdict for the plaintiffs for a return of the property to them, or for the value thereof, assessing the same at \$3,800. A stay of proceedings was granted, and the defendant's exceptions were ordered to be heard at the general term in the first instance.

The general term, after argument of such exceptions, overruled the same, and directed judgment for the plaintiffs on the verdict. Thereupon an order was entered which in form treated the defendant as having made a motion for a new trial on the exceptions ordered to be heard in the first instance at general term, and, after reciting such fact, continued thus: "Ordered, that such motion be, and the same hereby is, denied, with costs; that the said exceptions be, and the same hereby are, overruled, and judgment for the plaintiffs on the verdict is hereby ordered." Judgment in accordance with the order was subsequently entered. The defendant then appealed from the order above mentioned to this court, and also from the judgment entered upon such order.

The plaintiffs now make the claim that the appeal from the order should be dismissed, and that the appeal from the judgment brings up nothing for review but the question whether the judgment appealed from is in accordance with the order of the general term, as there was no statement in the appeal from the judgment that the appellant

intended to bring up for review any intermediate order, as pointed out by sections 1301 and 1316 of the New Code. There is no foundation for the claim. The exceptions of the appellant were ordered by the trial court to be heard, in the first instance, at the general term, and it was pursuant to such direction that the argument of such exceptions was then had, and the decision of the court upon such argument was made in the form of an order, and that order was simply a written authority upon which to enter the judgment, and was not such an intermediate order as is referred to in section 1301 or 1316, and no appeal would lie from it to this court. But, after the entry of judgment, an appeal from such judgment brings up for review the exceptions taken by defendant upon the trial. The appeal taken by defendant from the order, as well as from the judgment, was useless, but evidently taken from more abundant caution; and, if that were the only appeal in the case, it would have to be dismissed as unauthorized; and yet, as it is taken in connection with the appeal from the judgment, which brings up all the exceptions for review, there is no necessity to formally dismiss the appeal from the order.

But upon the merits of the appeal quite an important question arises in relation to the law of evidence. The court directed a verdict for the plaintiffs; and if, therefore, there was evidence enough to authorize a submission of the question of fraud to the jury, the judgment must be reversed. We think there was, and, had it not been for the rule of law adopted by the court below, we suppose that court would have been of the same opinion. That rule was that, as the defendant called a witness by whom he attempted to prove the fraud, and as that witness denied it, the defendant was bound by that denial, in the absence of contradiction by some other witness, even though the jury might think some parts of the evidence of the witness clearly showed its existence. To show exactly how the question arose, and what was decided by the court, some reference must be made to the testimony, although it will be unnecessary to allude to it all.

The assignor, Exstein, was a merchant engaged in a large business in Buffalo. He kept regular books of account in his business, which were produced upon the trial, and he was called as a witness for the defendant, and gave evidence in relation to the books, and upon other matters. His assignment was made on the seventeenth of October, and on the sixteenth of that month he made entries in several accounts which he kept, crediting quite large sums of money to the different persons named in such accounts, the result of which entries was to cause it to appear by the books that the assignor was in their debt to a somewhat large amount, while if the entries as of the sixteenth of October were stricken out it

would then appear that the parties, instead of being creditors, were in reality debtors, of the assignor. When on the stand, he substantially stated that, if those entries were stricken out, the state of affairs between himself and those persons would be as represented in the books; or, in other words, that, excluding those entries and the circumstances upon which they rested, some of these persons would be his debtors. He also said that these entries did not in fact represent any actual transaction occurring at the time when they were made, and that no valuable or other consideration passed between him and those parties at such time. Stopping with these facts, it would appear, then, that credits were given these persons the day before the assignment, upon which some of them drew out moneys from him, and upon the basis of which one was made a preferred creditor in the assignment, and yet such entries represented no actual, present transactions happening at the time when they were made. Unexplained, it would appear that as a result Exstein had provided for the payment of large sums of money, or had already, and in view of his assignment, paid such sums to persons whom he did not owe; or, in other words, he had paid, and also made provision in his assignment for the payment of, fictitious debts.

The defendant, however, proceeded with his examination of this witness, and asked for an explanation of these entries, and the facts or circumstances upon which they were based, and the witness proceeded to give it. The explanation was, if true, sufficient in law, and showed that he did owe the persons the amounts he claimed to, with the possible exception of one or two cases in which the defendant claims that, even on the basis of the general truth of the explanation, the witness had charged himself in reality with more than he owed. The defendant then rested, and the plaintiffs, with the evidence in this state, asked for a verdict in their favor by the direction of the court, and obtained it.

The court held, in substance, that the books of the witness Exstein showed a prima facie case of an indebtedness of the witness in the amounts therein appearing, and to the persons therein mentioned, and the witness said they were correct. He then stated what has already been alluded to as to those entries made on the sixteenth of October, and continued by explaining the facts upon which they were based. This explanation the court said was totally uncontradicted by any other witness, and defendant was therefore bound by what Exstein said on that subject, for the reason that he could not discredit or impeach him, and must take what he said as, under the circumstances of the case, true. If that were the true rule, the court was correct in directing a verdict. The general term, it must be presumed, also took the same view of the case in directing judgment for the

plaintiffs without delivering any written opinion.

The general rule prohibiting the impeachment or discrediting of a witness by the party calling him was extended too far in this case. Here was an issue of fraud in the making of an assignment by the assignor; and the defendant, in order to prove its existence, called the very man as a witness whom he alleged was guilty of the fraud. He might well be regarded, therefore, as an adverse witness, whom the party, by the exigencies of his case, was obliged to call. With regard to such witnesses it is well settled that all the rules applicable to the examination of other witnesses do not in their strictness apply. An adverse witness may be cross-examined, and leading questions may be put to him by the party calling him, for the very sensible and sufficient reason that he is adverse, and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist.

What favorable facts the party calling him obtained from such a witness may be justly regarded as wrung from a reluctant and unwilling man, while those which are unfavorable may be treated by the jury with just that degree of belief which they may think is deserved, considering their nature and the other circumstances of the case. Starkie, one of the ablest and most philosophical of English writers on this branch of the law, in speaking of a reluctant or adverse witness, uses almost the precise language above stated, and which has been substantially quoted from him. Starkie, *Ev.* (9th Ed.) marg. p. 248.

Sometimes rather loose language has been indulged in, to the general effect that a party cannot impeach his own witness; but, when an examination is made as to the limits of the rule, the result will be found to be that it only prohibits this impeachment in three cases, viz.: (1) The calling of witnesses to impeach the general character of the witness; and (2) the proof of prior contradictory statements by him; and (3) a contradiction of the witness by another, when the only effect is to impeach, and not to give any material evidence upon any issue in the case. *Lawrence v. Barker*, 5 Wend. 301-305; *People v. Safford*, 5 Denio, 112; *Thompson v. Blanchard*, 4 N. Y. 303-311; *Coulter v. Express Co.*, 56 N. Y. 585; 2 Starkie, *Ev.* (9th Am. Ed.) marg. pp. 244-250; 2 Phil. *Ev.* (C. & N. & Ed. notes) marg. pp. 981-983, and note 602; 1 Greenl. *Ev.* § 442.

In regard to the first class, the rule has been stated to rest upon the theory that, when a party calls a witness, he presents him to the jury as worthy of belief, and to allow him to call witnesses thereafter to impeach his general character as a man would be to permit an experiment to be made upon the jury by producing a person as worthy of belief, whom he knows, and has witnesses

to prove, to be the contrary, and, if his evidence be favorable, to get the benefit of it, and, if the reverse, to overwhelm it by the impeaching witnesses. In such a case as this, however, there is no deception. The defendant calls the very man he accuses of the fraud as a witness to prove it, and says in effect to the jury that such evidence as the witness gives, which tends to show the perpetration of the fraud alleged, is forced from him by the exigencies of the case, and the surrounding facts which cannot be denied, while that which he gives which looks towards an explanation of the fraud the jury shall give such faith to as, under all the facts in the case, they may think it entitled to.

As to the second class in which an impeachment is forbidden, the authorities in England were in conflict, many of the judges thinking it allowable to prove prior contradictory statements by a witness; but the weight of authority was against it, thereby creating the occasion for an interference by the legislature with the law of evidence, which passed an act permitting just such evidence under certain restrictions. See common law procedure act of 1854 (17 & 18 Vict. c. 125, § 22). The non-admissibility of such evidence in the courts of this state is, of course, not open to discussion. It is alluded to only to show the opinion of the English parliament (in matters of this nature almost exclusively guided by lawyers) upon this question of impeaching one's own witness, and the readiness of that body to alter the law of evidence in the direction of what seemed to it greater opportunity of ascertaining and administering that for which all courts are instituted, viz., truth and justice.

The third of above classes where no impeachment is allowed, is plainly set forth in several of the cases and text-books above cited. It is not admissible, even in the case of a witness called by the other side, to impeach him by proof of prior contradictory statements on immaterial or collateral issues; and there is not much difference in the two cases, and therefore no reason why it should be allowed with reference to one's own witness. But all the cases concur in the right of a party to contradict his own witness by calling witnesses to prove a fact material to the issue to be otherwise than as sworn to by him, even when the necessary effect is to impeach him.

Why should not the right exist to show that a portion of the evidence of your own witness is untrue, by comparing it with another portion of the evidence of the same witness? The courts below say in effect that, although a portion of Exstein's evidence shows that he provided for payment in his assignment for fictitious debts, yet the other portion of his evidence, if believed, shows that such debts were not fictitious; and, although the defendant was at liberty to call other witnesses to prove that the ex-

planation was false, yet, as he did not do so, the explanation must stand as matter of law, and he cannot be heard to contend that it is proved false by its own absolute and inherent improbability. We do not believe, at least in such a case as this, that the rule goes to any such length.

The plaintiffs cite the case of *Branch v. Levy*, 46 N. Y. Super. Ct. Rep. 428, as upholding the rule laid down by the trial court. The plaintiffs there brought an action to recover damages from defendants for the non-delivery of coupons bought from the defendants' agent, as plaintiffs claimed; but defendants denied the agency, and alleged they had sold the coupons to the person who plaintiffs alleged was their agent, and had no liability for his subsequent acts. On the trial the plaintiffs sustained their claim *prima facie* by certain letters and circumstances which, as the court said, in the absence of explanation by defendants, made a question for the jury. The plaintiffs then, for some inexplicable reason, called one of the defendants, who swore that the person selling the bonds to the plaintiffs was not the agent of the defendants, but they had simply sold him the bonds. The court held the plaintiffs concluded by this evidence, and that they must take it as wholly credible; that credibility could not be divided; and that it was attached to the moral character. That case comes very near the one under discussion, and it is hard to see why the plaintiffs should not have been allowed to go to the jury upon the whole of their case,—letters, documents, and explanation,—and why they should not have been allowed to ask the jury to believe the documents and letters, and reject the explanation as in their judgment untrue. To say that credibility is a part of the moral character, and indivisible, is to run counter to the well-established rule as to adverse witnesses above referred to, whose testimony you may ask a jury to believe in part, and to disbelieve the residue. The case ought not to be followed. It is a good general rule that the credibility of a witness is matter for the jury, and the fewer technical obstructions there are to the practical operation of that rule the better.

We think that the whole evidence of Exstein in this case should have been submitted to the jury for them to pass upon its credibility, and that they were at liberty to believe that portion which tended to show the debts to be fictitious, and to disbelieve the explanation, or that they might regard it as sufficient,—just as in their judgment, intelligently and honestly exercised, they might determine. Of course, we do not mean by this decision to give any intimation as to which view should be taken by the jury. We only decide that it was a question for them, and not the court.

The judgment should be reversed, and a new trial granted; costs to abide the event. All concur.

SELOVER et al. v. BRYANT.

(56 N. W. 58, 54 Minn. 434.)

Supreme Court of Minnesota. Aug. 21, 1893.

Appeal from municipal court of Minneapolis; Elliott, Judge.

Action by George H. Selover and another, copartners as Selover & Gould, against John W. Bryant, administrator of the estate of George M. Bryant, deceased, to recover for professional services as attorneys. Plaintiffs had judgment, and from an order denying a new trial defendant appeals. Affirmed.

George R. Robinson, for appellant. Boardman & Boutelle, for respondents.

DICKINSON, J. The plaintiffs, as attorneys at law, prosecuted an action for a divorce against the defendant and in behalf of his wife. The action was settled between the parties, and dismissed. The plaintiffs prosecute this action to recover for their legal services in behalf of the defendant's wife, claiming that in the settlement of the former suit the defendant agreed with his wife to pay for such services. The defendant denies that agreement. After a verdict for the plaintiffs upon that issue, and the refusal to grant a new trial, the defendant appealed.

The plaintiffs called the defendant's wife as a witness in their behalf. Her testimony tended to refute the claim of the plaintiffs as to the alleged agreement. After a preliminary examination of the witness, as to former contradictory statements made by her, the plaintiffs were allowed to show that she had made a statement of the fact to one of the plaintiffs materially different from her testimony. The case justified the conclusion of the court that the plaintiffs were surprised by the adverse testimony. It is one of the controverted questions in the law of evidence whether a party calling a witness, and who is surprised by his adverse testimony, may be permitted to show that he had made previous statements contrary to his testimony. A learned writer has said that the weight of authority seems to be in favor of admitting such proof. 1 Greenl. Ev. § 444. We are in doubt whether the weight of authority is not the other way; but we feel confident that well-recognized reasons and principles of the law of evidence support the proposition that, at least in the discretion of the trial court, such evidence is admissible. It is perfectly well settled, and upon satisfactory reasons, that if the defendant had called the witness to the stand, and she had testified as she did as to the fact in issue, the plaintiffs, after proper preliminary proof, would have been allowed to show by other witnesses that she had made statements contrary to her testimony. This rule, now everywhere recognized, rests upon the obvious propriety and necessity of informing the jury of circumstances so directly bearing upon the credibility of the witness and the value of his

testimony as do contradictory statements by him of the controverted facts concerning which he testifies, and which the jury must determine. But this controlling reason for allowing such discrediting evidence exists, and with precisely the same force, whether the witness has been called to the stand by the opposite party or by the party who offers the impeaching proof; and if the witness may be thus discredited by the party who did not call him, but may not be discredited by the party who called him, the reason must be that by calling the witness to the stand the party holds him forth as being worthy of credit, and hence he should not be allowed afterwards to impeach his credibility. And this is the proposition which, in one form or another, is generally assigned as the reason of the rule disallowing such impeachment wherever that rule has prevailed. This rule and the reason for it has been so generally accepted and applied with reference to an impeachment by a party of the general reputation of a witness whom he has called that it is perhaps not now to be questioned; but, as respects the particular discrediting proof which we are considering, the practice has been less uniform, and the excluding of the discrediting proof has been more strenuously opposed by the best authorities. The reason upon which it rests is, we think, plainly fallacious. The fault in the reason lies in the premise that, by calling the witness, the party presents him as being worthy of credit, or, in any sense, vouches for his truthfulness. In some sense and measure this may be true; but laying aside the subject of general impeachment, and directing our attention only to the question of allowing proof of statements contrary to the testimony by which a party is surprised at the trial, the above-stated reason is of no controlling force, except as it includes and implies such a degree of responsibility for the credit of the witness—such a personal voucher of his truthfulness—that it would be bad faith, double dealing, trifling with the court, or something akin thereto, for the party to afterwards throw discredit upon his testimony. The premise is not tenable. A party is not to be held to have assumed any such responsibility as to the truthfulness of a witness, and ordinarily, at least, there can be no imputation of bad faith, or anything like it, when, the party being surprised by his own witness testifying directly in favor of the adverse party, he offers to show his preliminary statements to the contrary, as impeaching his credibility. One has not all the world from which to choose the witnesses by whose testimony he must prove his case. He has not the freedom of choice that one has in the selection of an agent. He can only call those who are supposed to know the facts in issue. He is entitled to have their testimony placed before the jury, not as the statements of his agents or representatives by which he is to be concluded, but as the testimony of witnesses whose credibility he cannot be expected to

vouch for, but which the jury are to determine. It is everywhere admitted that a party whose witness testifies against him is not concluded thereby. He may prove the fact to be contrary to such testimony, although that does discredit a witness whom he has called. We deny that, by calling a witness to the stand, a party becomes responsible for his credibility in any such sense that he is absolutely precluded, when surprised by adverse testimony, from showing that the witness had made statements of the facts contrary to his testimony. It is at least within the discretion of the court to allow this.

It has been suggested that this affords an opportunity to fraudulently get before the jury the unsworn statement of a witness which the jury may accept as evidence of the fact. But the same objection may be urged in opposition to allowing a party to discredit in this way a witness called by the adverse party; yet this is always allowed. The direct, certain, and obvious effect of such evidence, in enabling the jury to rightly weigh the testimony, should prevail over the far more remote, improbable, and collateral considerations that opportunity may be thus afforded to a dishonest party to collude with a dishonest witness to make a false statement of facts, which the witness would not swear to, in order that, after the witness shall have testified to the truth, the false unsworn statement to the contrary may be shown. There are so many contingencies in the way of such barely possible results that the remote possibility is not of much weight, as against the plain practical considerations opposed to it. While, perhaps, the weight of authority is in favor of excluding such evidence, we feel that, in holding it to be within the discretion of the court to receive it, we are justified, not only by reason, but by a sufficient array of authority. In the English courts both views have been sanctioned. A strong presentation of the rule allowing such proof was made by Lord Chief Justice Denman in *Wright v. Beckett*, 1 Moody & R. 414.

This view is preferred in *Starkie, Ev. (Sharwood's Ed.)* 245; 2 Phil. Ev. marg. pp. 985-995; 1 Greenl. Ev. 444; *Cowden v. Reynolds*, 12 Serg. & R. 281, 283; *Bank v. Davis*, 6 Watts & S. 285; *Smith v. Briscoe*, 65 Md. 561, 5 Atl. Rep. 334; *Campbell v. State*, 23 Ala. 44, 76; *Hemingway v. Garth*, 51 Ala. 530; *Moore v. Railroad Co.*, 59 Miss. 243; and see *Johnson v. Leggett*, 28 Kan. 590, 606. See, also, a discussion of this subject in 11 Am. Law Rev. 261. It may be added, as indicating what it has been considered the rule ought to be, that in England and in several of our states statutes have been enacted allowing such proof to be made. Our conclusion on this point is that the court did not err in receiving the evidence.

The only other assignments of error which we deem worthy of specific mention are those relating to the charge of the court that the value of the services (of the plaintiff) "to Mrs. Bryant" should be considered by the jury. There was no error in this. The court did not say that that consideration alone should be taken as the measure of value. The value of the services of an attorney is necessarily to be determined by many considerations besides the mere time visibly employed in the conduct of a suit. Among other things, the importance and results of the case are to be considered. The importance of the cause to the client affords to some extent a measure of the skill, care, responsibility, anxiety, and effort demanded of and to be borne by the attorney, and should not be disregarded in their bearing upon the question of the value of such services. *Eggleston v. Boardman*, 37 Mich. 14.

The seventh assignment of error—that the court erred in overruling the motion for a new trial—is too general to be available.

Order affirmed.

GILFILLAN, C. J. On the point of the admissibility of the evidence of contradictory statements made by the witness Bryant, I dissent.

GERTZ v. FITCHBURG R. CO.

(137 Mass. 77.)

Supreme Judicial Court of Massachusetts. Suffolk. March 19, 1884.

J. J. Myers, for plaintiff. C. A. Welch, for defendant.

HOLMES, J. In this case, the plaintiff having testified as a witness, the defendant put in evidence the record of his conviction, in 1876, in the United States district court, of the crime of falsely personating a United States revenue officer. The plaintiff then offered evidence of his character and present reputation for veracity, which was excluded, subject to his exception.

We think that the evidence of his reputation for truth should have been admitted, and that the exception must be sustained. There is a clear distinction between this case and those in which such evidence has been held inadmissible; for instance, to rebut evidence of contradictory statements (Russell v. Coffin, 8 Pick. 143; Brown v. Mooers, 6 Gray, 451), or where the witness is directly contradicted as to the principal fact by other witnesses (Atwood v. Dearborn, 1 Allen, 483).

In such cases, it is true that the result sought to be reached is the same as in the present,—to induce the jury to disbelieve the witness. But the mode of reaching the result is different; for, while contradiction or proof of contradictory statements may very well have the incidental effect of impeaching the character for truth of the contradicted witness in the minds of the jury, the proof is not directed to that point. The purpose and only direct effect of the evidence are to show that the witness is not to be believed in this instance. But the reason why he is not to be believed is left untouched. That may be found in forgetfulness on the part of the witness, or in his having been deceived, or in any other possible cause. The disbelief sought to be produced is perfectly consistent with an admission of his general good character for truth, as well as for the other virtues; and until the character of a witness is assailed, it cannot be fortified by evidence.

On the other hand, when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit. 1 Gilb. Ev. (6th Ed.) 126.

The conviction in the United States district court was for a felony punishable with imprisonment (St. U. S. March 2, 1867, § 28); and, assuming that it stands on the same footing as a conviction in another state, it would have been admissible, according to the dicta in our cases, independently of statute, not to exclude the witness, but to impeach his credit. Com. v. Green, 17 Mass. 515, 541; Com. v. Knapp, 9 Pick. 496, 511; Utley v. Merrick, 11 Metc. (Mass.) 302. See Rev. St. c. 94, § 56. And when a conviction is admitted for that purpose, it always may be rebutted by evidence of good character for truth. Com. v. Green, ubi supra; Russell v. Coffin, 8 Pick. 143, 154; Rex v. Clarke, 2 Starkie, 241; Webb v. State, 29 Ohio St. 351.

It is true that a doubt is thrown upon this doctrine in Harrington v. Lincoln, 4 Gray, 563, 568; but that case was decided on the ground that the cross-examination which showed that the witness had been charged with a crime also showed that he had been acquitted, and cannot be regarded as an authority against our decision, whether the ratio decidendi adopted be reconcilable with later cases or not. Com. v. Ingraham, 7 Gray, 46.

The applicability of the foregoing reasoning is made clear by the language of our statutes. By Pub. St. c. 169, § 19, the only purpose for which conviction of a crime may be shown in any case is to affect credibility. Even if the conviction proved here would have excluded the witness but for the statute cutting down its effect, it could not be maintained that evidence of reputation for truth remained inadmissible because it would have been so when the witness was excluded. The statute puts all convictions of crime on the same footing,—those which formerly excluded, those which always have gone only to credibility, and, it would seem, those which formerly would not have been admissible at all. We assume that the words “a crime” in Pub. St. c. 169, § 19, mean the same as “any crime” in St. 1870, c. 393, § 3; Gen. St. c. 131, § 13; St. 1852, c. 312, § 60; St. 1851, c. 233, § 97; Com. v. Hall, 4 Allen, 305. And therefore any evidence which was admissible to rebut a conviction that only discredited before the statute must now be admissible to rebut all convictions that may be put in evidence. Whether any different rule would apply when the fact is only brought out on cross-examination we need not consider.

The exception to the exclusion of evidence that the witness was innocent of the offence of which he was convicted, and explaining why he was convicted, is not much pressed, and is overruled. Com. v. Gallagher, 126 Mass. 54.

Exceptions sustained.

PEOPLE v. BROOKS.

(30 N. E. 189, 131 N. Y. 321.)

Court of Appeals of New York. March 1, 1892.

Appeal from supreme court, general term, Fourth department.

Indictment of Rachel Brooks for arson. Defendant was convicted, and the general term affirmed the sentence. Defendant appeals. Affirmed.

Louis Marshall, for appellant. T. E. Hancock, Dist. Atty., and B. J. Shove, Asst. Dist. Atty., for the People.

EARL, C. J. The defendant was indicted for setting fire to the store occupied by her in the city of Syracuse on the 27th day of October, 1890. She was brought to trial in the court of sessions of Onondaga county in February, 1891, and was convicted of arson in the first degree, and was sentenced to the Onondaga penitentiary for the term of 15 years. Her conviction having been affirmed by the general term of the supreme court, she then appealed to this court.

The learned counsel for the defendant has brought to our attention three grounds upon which he claims the judgment should be reversed. Upon the trial the principal evidence adduced against the defendant to show her guilt was that of Charlotte Brooks, the daughter of her husband by a former wife, who was about 18 years old. She testified that, three or four days before the fire, the defendant required her to take an oath, by kissing the Jewish Bible, that she would not tell to any one what she was about to say to her; and that, after she had taken the oath and promised that she would not tell, she said to her that she had bills for goods to settle, and that there was a judgment against her, and she was going to make a bonfire of the goods in the store, and burn them up; and that, after she had taken the oath, the defendant told her, if she did tell what she had said to her, she would be sent to prison for 20 years for perjury. There was other evidence pointing to the guilt of the defendant, and corroborating the story related by the witness Charlotte. The defendant was called as a witness on her own behalf, and these questions were put to her by her counsel: "Now state whether or not Charlotte was friendly to you or unfriendly." "Did you and Charlotte have frequent difficulties during that time?" (Meaning the time previous to the fire.) "Did Charlotte assault you on other occasions previous to the fire?" All these questions were objected to on the part of the prosecution as incompetent, because Charlotte had not been examined as to the particular matters inquired of on behalf of the defendant. The trial judge sustained the objection, and excluded the evidence, because Charlotte had not been examined as to the same matters, and her attention had not been called to the particular matters inquired of.

In making the ruling the trial judge said: "You have the witness here, and can ask anything you wish of her that she has not testified to, and, if you think she has not told the truth, you can ask the witness about it; and I think that is as far as you can go. I think the rule is this: that a witness may be cross-examined as to his or her attitude of mind in regard to the defendant, and his attention must be called to each and all the transactions upon which the counsel for the defendant desires to give evidence. If the witness admits the acts and declarations that the defendant claims were made and done, that is the end of it. If the witness denies, then I think it is competent to call other witnesses to contradict those matters; but to let a witness go off the stand, not having questioned the witness as to the particulars, and then calling third parties to prove independent transactions showing the attitude of the mind of the witness towards the party, I think is not the rule. So I have allowed and do allow this witness to testify as to any transactions bearing upon that point in regard to which the witness Charlotte was examined." And the judge said, further: "I should say that the witness referred to is in court now, so that there is no loss to the defendant by the application of the rule as I understand it." But the counsel insisted upon his right to examine the defendant, for the purpose of proving Charlotte's hostility towards her, without first examining Charlotte in reference to the same matter. We think the rule of law laid down by the trial judge was erroneous. The hostility of a witness towards a party against whom he is called may be proved by any competent evidence. It may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it. There can be no reason for holding that the witness must first be examined as to his hostility, and that then, and not till then, witnesses may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice; and, as that may be proved by any competent evidence, we see no reason for holding that he must first be examined as to his hostility. And such we think is the drift of the decisions in this state and elsewhere. *Hotchkiss v. Insurance Co.*, 5 Hun, 90; *Starr v. Cragin*, 24 Hun, 177; *People v. Moore*, 15 Wend. 419; *People v. Thompson*, 41 N. Y. 6; *Schultz v. Railroad Co.*, 89 N. Y. 242; *Ware v. Ware*, 8 Greenl. 42, 53; *Tucker v. Welsh*, 17 Mass. 160; *Day v. Stickney*, 14 Allen, 255; *Martin v. Barnes*, 7 Wis. 239; *Robinson v. Hutchinson*, 31 Vt. 443; *New Portland v. Kingfield*, 55 Me. 172; *Hedge v. Clapp*, 22 Conn. 262; *Cook v. Brown*, 34 N. H. 460. So we think the trial judge laid down an erroneous rule of law.

But we are still of opinion that no harm

was done to the defendant. The extent to which an examination may go for the purpose of proving the hostility of a witness must be, to some extent at least, within the discretion of the trial judge. We said about it, in *Schultz v. Railroad Co.*, *supra*, that "the evidence to show the hostile feeling of a witness, when it is alleged to exist, should be direct and positive, and not very remote and uncertain, for the reason that the trial of the main issue in the case cannot be properly suspended to make out the case of hostile feeling by mere circumstantial evidence from which such hostility or malice may or may not be inferred." Before these questions were excluded, the defendant's counsel, on the examination of Charlotte, proved by her that she and the defendant had had frequent altercations; that the defendant "used to whip her lots of times;" that on a certain occasion when she was impudent to the defendant, not long before the fire, the defendant threw her down; that on that occasion the defendant assaulted her, and bit her and pushed and knocked her down on the floor, and when she got up she said to the defendant, "You will be sorry. What did I do to you? My mother would not knock me down;" and that her troubles with her step-mother were frequent; that they had trouble on every rainy day; that "she was disagreeable to her on rainy days." And the defendant, before these questions were excluded, testified that a few days before the fire she and Charlotte had an altercation, and that "Charlotte got mad, and pulled her down and slapped her in the face, and pounded her on her back" so that she fell down, and came near fainting away. We think there was ample evidence to show the state of feeling between the defendant and Charlotte, and, if the examination of the defendant upon that subject had been much further prolonged, it could not have added any weight to the evidence already given on that subject. Sufficient evidence for every purpose of the trial had been given to show difficulties and hostilities between the defendant and Charlotte, and therefore it is clear that the defendant was not harmed by the exclusion of further evidence on that subject. Besides, the jury utterly disregarded the defendant's evidence. She denied under oath all the evidence tending to implicate her in the crime, and explicitly denied that she had stated to Charlotte her intention to burn the goods in the building, and gave some evidence tending to cast suspicion upon Charlotte as the author of the crime. This is therefore a case where the rule laid down in section 542 of the Code of Criminal Procedure should be applied. That section provides as follows: "After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties."

It is also claimed by the defendant's counsel that the judge erred in his charge to the

jury. Upon the trial of the action the defendant called several witnesses who testified to her good character. After fairly charging the jury on the question of reasonable doubt and the effect of good character, he used this language: "And in the trial of the case, if that reputation has been shown to be good, yet if the evidence on the trial indicates corruptness, fraudulent practice, bad heart, dishonesty, fraud, it rebuts, so far as it goes, the reputation for good character; that is to say, positive testimony of the commission of a crime extinguishes it altogether, if you believe the testimony." After he had finished his charge, the counsel for the defendant said: "The charge is very satisfactory, and I do not rise to find any fault with it. Your honor has charged that if the jury find that there is reasonable doubt that they must acquit. Now, I ask your honor to charge that good character may be sufficient to raise that reasonable doubt which requires the jury to acquit." And the judge so charged. Then the counsel for the defendant further said: "Your honor charged that if, on the trial of a case, it is shown that the person has been corrupt and guilty of fraudulent practices, it rebuts the evidence, and the importance attached to it, of good character,—is an answer to it. I do not give your honor's precise language, but that is the substance, and what your honor did charge upon that question, and all, I take exception; and, furthermore, I ask your honor to charge that these remarks are not applicable to this case." The judge refused to so charge. We do not think these exceptions to the charge were well taken. The judge had in his charge given the defendant the full benefit of the evidence as to her good character. He did not charge that the evidence of good character was not to be taken into account with all the other evidence upon the question of her guilt or innocence. He did instruct them that, if there was positive testimony of the commission of the crime by her which the jury believe, it extinguished the evidence of good character altogether. That is literally true. If the jury upon any trial find positive evidence, which they believe, that the defendant committed the crime charged, it must utterly overwhelm or destroy the effect of the evidence as to good character. If the judge had charged that the jury had no right to take into account the good character of the defendant in the case of positive evidence of her guilt, it would undoubtedly have been erroneous. If he had charged them that they should not weigh the evidence as to the defendant's character with all the other evidence, however strong and positive, it would have been erroneous. The evidence of character may, however strong the other evidence is, raise a doubt in the minds of the jury which the defendant is entitled to have the benefit of. If the instructions of the judge upon the question of character were not sufficiently explicit, the de-

fendant should have requested a further charge calling attention to further instructions which he desired the jury to have. After the judge had laid down the law quite plainly pertaining to evidence of good character, and had at the request of the defendant's counsel instructed the jury that good character might be sufficient to raise a reasonable doubt which required the jury to acquit, if the defendant's counsel thought any further instructions were needed to protect his client he should have asked for them. So, we find no error in the charge to the jury.

We are also asked to reverse the judgment on account of intemperate language used by the district attorney in his address to the jury, to which no exception whatever was taken. It is a sufficient answer to this claim to say that this court has no jurisdiction to grant a new trial in such a case as this, unless exceptions appear in the record which present questions of law. The supreme court,

under section 527 of the Code of Criminal Procedure, could, in the exercise of its discretion, have granted a new trial in this case. In the early part of that section provision is made for a stay of the execution of a judgment in a criminal case upon an appeal to the supreme court, and in the last clause of the section it is provided as follows: "The appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below." That clause has reference only, as we have held, to appeals to the supreme court. *People v. Hovey*, 92 N. Y. 534; *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493; *People v. Donovan*, 101 N. Y. 632, 4 N. E. 181. We see no reason to doubt that this conviction was justified by the evidence, and, finding no error of law prejudicial to the defendant, it should be affirmed. All concur.

DAVIS v. COMMONWEALTH.

(23 S. W. 585, 95 Ky. 19.)

Court of Appeals of Kentucky. Oct. 12, 1893.

Appeal from circuit court, Lawrence county.

Samuel Davis was convicted of murder, and appeals. Affirmed.

R. T. Burns and Stewart & Stewart, for appellant. W. J. Hendrick, for the Commonwealth.

BENNETT, C. J. The appellant having been convicted of the crime of murdering Viance Tack, in the Lawrence circuit court, he appeals, and complains as follows:

First. That the court erred in not allowing him to prove by G. W. Miller that Granville Pearl confessed to him on his death-bed that he, Pearl, killed Viance Tack. It seems to us that admissions and confessions, as to competency, stand upon the same footing. Admissions cannot be used in evidence except against the person making them in an issue between him and another person, wherein the truth of the admission is involved, or against his privies claiming through him; and confessions are incompetent evidence except against a person charged with crime, or, in a proper state of case, against his confederates. Nor is the proposed evidence competent as a dying declaration, because such evidence is only competent when it comes from a declarant whose

personal injuries by another have resulted in death, and the declarations must be confined to the manner and circumstances of the injury and to the person that did it.

Second. In allowing evidence to go to the jury impeaching witnesses who had testified for the appellant, but who had not testified to any material fact for the appellant; the material fact which the appellant desired to prove by them having been excluded by the court. It seems to us that the fact that the witness is sworn and testifies entitles the adversary to impeach his general reputation for truth, without reference to the materiality of his evidence; otherwise there would be constant strife and litigation over the question as to the materiality of the witness' evidence, in order to determine whether or not the impeaching evidence was admissible.

Third. It is contended that evidence of the bad character of a witness sought to be impeached, two years before the time that he testified, is incompetent. It is true that the character of a witness at the time he testifies is in issue before the court or jury, but it is equally true that his reputation before then may be inquired into, in order to throw light upon his reputation at the time he testifies. There is no doubt that Viance Tack was assassinated, and we think that the evidence authorized the jury to believe beyond a reasonable doubt that the appellant was the guilty party. The court committed no error. The judgment is affirmed.

NELSON v. STATE.

(13 South. 361, 32 Fla. 244.)

Supreme Court of Florida. July 15, 1893.

Error to circuit court, Marion county; Jesse J. Finley, Judge.

John Nelson, Jr., was convicted of murder in the first degree, and brings error. Reversed.

Miller & Spencer, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error was indicted and tried at the fall term, 1892, of the circuit court for Marion county, for murder in the first degree of one Charles Davis, the trial resulting in the following general verdict, viz.: "We, the jury, find the defendant guilty." Upon the refusal of the court below to grant his motion for a new trial, the defendant was sentenced to die, and brings his case here by writ of error.

The insufficiency of the verdict in not specifying the degree of murder of which it finds the defendant guilty is assigned as error. This court, at its last term, in the cases of *Hall v. State*, 31 Fla. 176, 12 South. Rep. 449; *Lovett v. State*, 31 Fla. 164, 12 South. Rep. 452; and *Murphy v. State*, 31 Fla. 166, 12 South. Rep. 453,—held that under the provisions of section 2383, Rev. St., such a verdict is a nullity, and that no judgment or sentence could legally be pronounced thereon. This error is fatal to the judgment and sentence appealed from, and necessitates its reversal.

At the trial the defendant introduced several witnesses for the purpose of impeaching the character for truth and veracity of one of the witnesses for the state, by proof that such witness' reputation for truth and veracity in the community in which he lived was bad, and that no credence would be given to his evidence under oath. After the defendant's witnesses, introduced for this purpose, had testified that they knew the state's witness, and knew his general reputation in the neighborhood in which he lived for truth and veracity, the court, over the defendant's objection, permitted the state attorney to break into the examination in chief by a cross-examination as to the sources and extent of the knowledge of the parties as to the reputation and character of the witness to be impeached, which ruling of the court was excepted to, and is assigned as error. The case of *Robinson v. State*, 16 Fla. 835, settles the practice in such cases. When the im-

peaching witnesses had answered that they knew the party to be impeached, and knew his general reputation for truth and veracity in the community where he lived, the foundation for proving what that reputation was had been sufficiently laid, and the court should not, at this juncture, have permitted the state attorney to interfere with the examination in chief by a cross-examination as to the sources and extent of their knowledge and information as to such reputation, but should have permitted the defendant to proceed with his examination in chief, and should have allowed the witnesses to state what that reputation was, and whether from that reputation they would believe the party under oath. When turned over for general cross-examination in regular order, at the close of the examination in chief, the state attorney could then, by cross-examination, test the extent of the information of the witnesses and the sources of their knowledge. This departure, however, from the proper practice in such cases, we do not now decide to be reversible error, as the court below necessarily has a wide discretion in all matters touching the order in which evidence shall be admitted.

On the cross-examination of one of the defendant's witnesses, by whom the general reputation and character of the defendant as a peaceful and law-abiding citizen had been put in proof, the state attorney was permitted by the court, over the defendant's objection, to put the following question to the witness: "Did you not hear or know, about one week or ten days before the shooting of which the defendant is now charged, that he was charged in your neighborhood with shooting into a house with a lot of women in it, and that the pistol was taken away from him?" Exception was taken, and this ruling was assigned as error. The court erred in permitting this question. When character for peacefulness or turbulence is put in issue in such cases, the general rule is that the proof thereof must be made by evidence of the general reputation of the party in the community for such character, and not by evidence of specific acts or conduct on particular occasions, (*Garner v. State*, 28 Fla. 113, 9 South. Rep. 835;) and, when such character is put in issue, the proof interposed in rebuttal must be confined also to general reputation, and not allowed to go into specific acts or conduct on particular occasions.

For the error in the verdict rendered, the judgment and sentence of the court below are reversed, and a new trial ordered.

GRIFFIN v. STATE.

(9 S. W. 459, 26 Tex. App. 157.)

Court of Appeals of Texas. Oct. 13, 1888.

Appeal from district court, Polk county; Edwin Hobby, Judge.

Crosson & Holshousen, for appellant. Asst. Atty. Gen. Davidson, for the State.

HURT, J. This conviction is for murder in the second degree, the punishment being fixed at confinement in the penitentiary for five years. The record contains the following bill of exceptions: "The state placed upon the stand Frank Waters, who testified that a short while before the killing of Van Chambers the defendant told him, as he [the defendant] was on his way to attend a party that night, that he was going to the party, expecting to find the deceased there, and, if he could get him, the said Chambers, out by himself, he would kill him. Defendant thereupon introduced 18 or 20 witnesses to impeach the said Waters, by showing that the general reputation of the said Waters for truth and veracity in the neighborhood where he lives was bad, and from that reputation the said Waters was not entitled to be believed under oath. The state then introduced some 10 or more witnesses to sustain the reputation of said Waters; among others, Dave Ballow, Polk Snow, D. S. Chandler, T. J. Epperson, W. J. Wakefield, and L. F. Gerlock, of whom the state asked this question: 'Do you know the witness Frank Waters?' They said, 'Yes.' 'Are you acquainted with his reputation for truth?' They said, 'Yes,' and that it was good. On cross-examination, they were asked by defense: 'Did you ever hear his reputation discussed?' They said, 'Never, until yesterday.' The state then asked each of said witnesses: 'Have you ever heard the reputation of said Waters for truth and veracity impeached or impugned before this?' to which defendant, by counsel, objected, because the question was improper, and not confined to the knowledge of said witnesses as to the general reputation of the said Waters in the neighborhood or community where he lived. The state then asked each of the following seven witnesses, (naming them:) 'Are you acquainted with the reputation of the witness Waters for truth and veracity?' which being answered in the affirmative, they were further asked if it was good or bad, which being answered, 'Good,' they were further asked if he, the said Waters, was entitled to be believed under oath,—to each and all of which said questions the defendant excepted because they were not proper in determining the general reputation of said witness in the neighbor-

hood where he lives for truth and veracity, and were permitting the witnesses to testify, not as to the general reputation of Waters for truth and veracity, but as to their own opinion and belief, which objection was overruled by the court, and to which defendant excepts."

Two objections are made to the questions and answers: (1) That the witnesses did not state that they were acquainted with Waters' general reputation in the neighborhood in which he lived. (2) That the witnesses were induced to, and did, state their opinions as to whether he was entitled to credit,—not from his general reputation for truth, but from their own knowledge or opinion of the witness. This question is very elaborately discussed by Justice Bell in the case of Boon v. Weathered, 23 Tex. 675. He states the rule to be that "the inquiry should be practically restricted to the general character of the impeached witness for truth. * * * If the impeaching witness states that he is acquainted with the general reputation of the impeached witness for truth in the community where he lives, he may then properly be asked whether that general reputation is such as to entitle the witness to credit on oath. * * * Any other form of words may be used, which does not involve a violation of the cardinal principles that the inquiry must be restricted to the general reputation of the impeached witness for truth in the community where he lives or is best known, and that the impeaching witness must speak from general reputation, and not from his own private opinion." We are of opinion that the questions propounded to the impeaching witnesses were not calculated to, nor did they elicit the proper answers; that the questions and answers were violative of the cardinal principles governing this subject: (1) The inquiry must be restricted to the general character of the party sought to be impeached. (2) The impeaching witnesses must speak from general reputation, and not from their private opinions as to whether the character of the impeached witness is good or bad for truth, or as to whether the general reputation of the impeached witness is such as to entitle him to credit on oath.

Venue is not proved either by direct or circumstantial evidence.

We call attention of the learned trial judge to the fact that malice is not defined to the jury. As to the necessity of defining malice, see Jones v. State, 5 Tex. App. 397; Tooney v. State, Id. 163; Pharr v. State, 7 Tex. App. 472; Harris v. State, 8 Tex. App. 90; McKinney v. State, Id. 626; Hayes v. State, 14 Tex. App. 330. The judgment is reversed, and the cause remanded.

McQUIGAN v. DELAWARE, L. & W. R. CO.

(29 N. E. 235, 129 N. Y. 50.)

Court of Appeals of New York. Dec. 1, 1891.

Appeal from supreme court, general term, fourth department.

Action by Michael McQuigan against the Delaware, Lackawanna & Western Railroad Company. Defendant appeals from an order refusing to compel plaintiff to submit to a physical examination Affirmed.

Louis Marshall, for appellant. Andrew Hamilton, for respondent.

ANDREWS, J. The sole question presented by this record is whether the supreme court has power, in advance of the trial of an action for a personal and physical injury, to compel the plaintiff, on an application made in behalf of the defendant, to submit to a surgical examination of his person by surgeons appointed by the court, with a view of enabling them to testify on the trial as to the existence and extent of the alleged injury. The question is not new in the courts, although, so far as we know, it was first presented in 1868, before a judge of the New York superior court at special term, in the case of *Walsh v. Sayre*, 52 How. Pr. 334, who affirmed the existence of the power. The contrary was held by the general term of the third department in *Roberts v. Railroad Co.*, 29 Hun, 154. In 1877 the supreme court of Iowa, in the case of *Schroeder v. Railway Co.*, 47 Iowa, 375, sustained the doctrine that the court had an inherent jurisdiction to grant a compulsory order that the plaintiff submit to such examination, and this decision has been followed by the courts of several of the western and southern states, and in others the power has been denied. The same question was considered in the United States supreme court in the recent case of *Railway Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, decided in May, 1891, and the court (two judges dissenting) decided adversely to the claim that the court had power to compel such examination. The opinions of the several courts which have passed upon the question present very fully the considerations bearing upon it. We concur in the view taken by the supreme court of the state and the supreme court of the United States, and we can add very little to the full discussion to be found in the opinions of those courts. The powers of courts are either statutory or those which appertain to them by force of the common law, or they are partly statutory and partly derived from immemorial usage, which latter constitutes their inherent jurisdiction. They are organized for the protection of public and private rights and the enforcement of remedies. Presumptively, therefore, whatever judicial procedure is essential to enable courts to exercise their function is authorized. The maxim that there is no right without a remedy justified the courts, in the earlier periods of the common law, in inventing writs and modes of procedure adapted to present for adjudication in proper form every question of

judicial cognizance. The powers and jurisdiction of the courts of common law and chancery in England are to be found in the English statutes, and in the rules, precedents, decisions, and procedure of the courts. The power which the courts actually exercised, supplemented by statutory powers, constitutes in a general sense their jurisdiction. Upon the organization here of the federal and state governments, courts were constituted, and in this state they succeeded to the powers theretofore exercised by the courts of law and chancery in England, so far as they were applicable to our situation. It is a significant fact that not a trace can be found in the decisions of the common-law courts of England, either before or since the Revolution, of the exercise of a power to compel a party to a personal action to submit his person to examination at the instance of the other party. If the power existed, it is difficult to suppose that it would not have been frequently invoked. Actions for assault and battery, for injuries arising from negligence, and generally for personal torts, were among the most common known to the law, and yet, so far as we can discover, in no case was it supposed or claimed that the court was armed with this jurisdiction. The non-exercise of a power is not conclusive against its existence, but it is inconceivable that, if the power in question existed, it should have been unused for centuries, and never have been called into activity. In two cases cited by Justice GRAY in his opinion in *Railway Co. v. Botsford*, supra, the court of common bench in England refused an order for the inspection of a building, on the application of the plaintiff in an action for work and labor performed by him thereon, on the ground of want of power. *Newham v. Tate*, 1 Arn. 244; *Turquand v. Strand Union*, 8 Dow, 201. These cases tend to negative the existence of the power in the English courts, claimed for our courts in the case at bar. The only authority in the English common-law courts in any degree analogous is found in the power which the courts of England have occasionally, though rarely, exercised,—to issue, on the application of apparent heirs, the writ *de ventre suscipiendo*, to compel a widow claiming to be with child by her deceased husband to submit her person to examination. The practice in England is *sui generis*, and has never been adopted here. It may have originated in the peculiar favor shown to heirs by the law of England, but, whatever its origin, it seems repugnant to common right, and the fact that in this instance only have the courts of England exercised the power to compel the examination of the person in a civil proceeding tends to show that the power is not there regarded as general, but special and peculiar, and limited to the particular case. The doctrine of the cases in chancery, (*Briggs v. Morgan*, 2 Hagg. Const. 324; *Devanbagh v. Devanbagh*, 5 Paige, 554; *Newell v. Newell*, 9 Paige, 25,) that in an action to procure a decree of nullity of marriage on the ground of impotence or sexual incapacity the chancellor may compel the defendant to submit to a surgical examination, is a graft from the civil and

common law, and, as has been said, "rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction." GRAY, J., in *Railway Co. v. Botsford*, supra.

When we examine the history of the power of common-law courts to compel the production and inspection of books and papers in possession of the opposite party in a civil action, we find that originally the courts disclaimed any power in the matter, and the remedy by bill of discovery was the only resource of the party desiring such discovery. Finally the common-law courts assumed a limited equitable jurisdiction over the subject, and, in addition to the rule that a party pleading a deed should make forfeit of the instrument which enabled the other party to demand oyer, the courts by order compelled a party who in his pleading relied upon a written instrument, not a deed, to give inspection to the other party if required, and so in other special cases. The courts in this state, prior to any statute, exercised a limited equitable jurisdiction of the same character. *Lawrence v. Insurance Co.*, 11 Johns. 245; *Denslow v. Fowler*, 2 Cow. 592, note. But this limited jurisdiction was exercised sparingly and with hesitation, and it was not until statutes were enacted in England and in this state, conferring upon common-law courts the same power to compel the discovery and inspection of books and papers which was exercised by courts of chancery on bills of discovery, that courts of common law claimed or exercised full power over the subject. St. 14 & 15 Vict. c. 99; St. 17 & 18 Vict. c. 125; Rev. St. p. 199, § 21. The limited jurisdiction exercised by these courts before the statute was in the nature of a usurpation, and, so far as we can discover, it was never considered that they possessed an inherent power in aid of justice to grant relief in cases outside of the narrow limit mentioned. The power to compel an inspection of books and papers relevant to the controversy, in possession of either party, is of a similar nature to that invoked in the present case, and, if the inherent power of the court did not extend to the one case, it is difficult to suppose that it embraced the other. The power to compel a party to submit to an examination of his person has never been conferred by any statute. The provisions of the Revised Statutes authorizing the court to compel the production of books or papers have been re-enacted in the Codes of Procedure. The statutes

also contain specific provisions for the examination of a party on oath before trial, at the instance of the other party. The omission in these statutes of any reference to the power not under consideration is quite significant. We cannot say that the exercise of the power claimed might not in some cases promote the cause of justice, and prevent the consummation of fraud. On the other hand, unless carefully guarded, it would be subject to grave objections. But we have to deal only with the question of the power of the courts in the absence of any legislation. It is very clear that the power is not a part of the recognized and customary jurisdiction of courts of law or equity. The doctrine that courts have an inherent jurisdiction to mould the proceedings to meet new conditions and exigencies is true, but in a limited sense. They cannot, under cover of procedure or to accomplish justice in a particular case, invade recognized rights of person or property. No court, we suppose, can abrogate an established rule of evidence, as, for example, the rule that hearsay evidence is inadmissible, or the rule of the common law that parties shall not be witnesses, or that interest disqualifies. They may apply existing rules to new circumstances. Nor is it, we conceive, within the power of the court to create remedies unknown to the common law, or institute a procedure not according to the course of the common law. It is most important that courts should proceed under the sanction of an orderly and regulated jurisdiction, and that as little as possible should be left to the discretion of a judge. The exercise by the court of the power now invoked, as has been shown, is not sanctioned by any usage in the courts of England or of this state. Its existence is not indispensable to the due administration of justice. Its exercise, depending on the discretion of the judge, would be subject to great abuse. We think the assumption by the court of this jurisdiction, in the absence of statute authority, would be an arbitrary extension of its powers. It is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until within a very recent period, never in fact had any existence. We have purposely omitted to repeat the views and authorities upon this question set forth in the opinions in *Roberts v. Railroad Co.*, and in *Railway Co. v. Botsford*, and we refer to those opinions for a fuller discussion of the grounds upon which the denial of the power claimed proceeds. The order should be affirmed. All concur.

ARNOLD v. PAWTUXET VAL. WATER CO.

(26 Atl. 55.)

Supreme Court of Rhode Island. Feb. 4, 1893.

Assumpsit by John J. Arnold against the Pawtuxet Valley Water Company. Plaintiff moves for an order requiring defendant to produce a book containing the record of its transactions. Motion granted.

George T. Brown, for plaintiff. Dexter B. Potter, for defendant.

TILLINGHAST, J. This is an application under Pub St. R. I. c. 214, § 45, for an order on the defendant to produce a certain document alleged to be in its possession, to be used by the plaintiff in the preparation of his case for trial. The plaintiff sets out in said application that he is informed and believes that the defendant is in the possession and control of a certain document, to wit, the book containing a record of the transactions and proceedings of the association in the plaintiff's declaration mentioned, prior to its incorporation, and also containing a record of the transactions and proceedings of said defendant corporation since its incorporation and organization. The plaintiff further represents that it is necessary for him to examine the records contained in said book, in order to prepare said case for trial, and to furnish the bill of particulars asked for by the defendant. He therefore prays the court to order said defendant, or the treasurer, or some other officer, thereof, to answer on oath as to what documents it has in its control relating to the matter in dispute between said parties, and what it knows relating to the custody of any such documents, and, if any such documents be in its possession or control, whether it objects to the production of the same, and the grounds of such objection. In response to an order to show cause, the president and secretary of the defendant corporation have filed an answer under oath to said application, in which they say "that said company is in possession and control of the 'book containing a record of the transactions and proceedings of the association in the plaintiff's declaration mentioned prior to its incorporation,' which book also contains 'a record of the transactions and proceedings of said defendant corporation since its incorporation and organization;' that said book is the private property of said defendant, in which its records are kept, and in which were kept the records of said association; that said book is not a 'document,' and that the plaintiff is not entitled to the same." "The defendant therefore objects to the production of said book upon the ground that it is not a 'document,' in the language of the statute, and that the plaintiff is not entitled to the same." The plaintiff's declaration, which is referentially made a part of said

application, sets out that the plaintiff, who is an attorney at law, rendered and performed divers legal services for the defendant, both before and since its incorporation, and that it was agreed and stipulated that, upon said association becoming incorporated, it should assume and take upon itself the payment and fulfillment of all debts, contracts, obligations, and undertakings contracted, entered into, and undertaken by said association prior to the organization of said corporation; and that, in pursuance of said agreement and stipulation, the said corporation, after its organization, did assume upon itself and promise to pay the plaintiff for his services so rendered to said association as aforesaid. At a former hearing of said application, before a single justice in chambers, it was held that the plaintiff was entitled to the production of said record book for the purposes mentioned in said application, and an order was made accordingly, whereupon the defendant, upon petition, obtained leave to reargue said question before the full court, which has since been done.

The defendant contends that the record book of the defendant corporation is not a "document," within the meaning of said statute, and hence that the court has no authority thereunder to grant the application. We do not think that said statute should receive so narrow and purely technical a construction as this. Indeed, to so hold would be to render it largely useless and inoperative, for it is a matter of common knowledge that a very large proportion of the written transactions of both public and private corporations, as well as those of private individuals, are either kept in book form in the first instance, or are afterwards stitched or bound together in such form, for preservation and convenience. Suppose that a dozen title deeds should thus be put together in book form, would the book be any the less a "document" than was each individual deed before being thus brought together? We think not. In the Revised Statutes of the United States (section 869) the following language is used, viz.: "And to bring with him, and produce to such commissioner, any paper or writing or written instrument, or book, or other document," etc.; thus classing a book as a document. In the case in *Re Shephard*, 3 Fed. 12, documentary evidence is held to include "books, papers, accounts, and the like." In *Johnson Steel Street-Rail Co. v. North Branch Steel Co.*, 48 Fed. 191, 194, the definition of the term "document" as given by Mr. Wharton in his *Law of Evidence* (volume 1, p. 614) was adopted. Said definition is as follows: "A 'document' is an instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidentially used. In this sense the term 'document' applies to writings, to words printed, lithographed, or photographed, to seals, plates, or stones on which inscriptions are cut or

engraved, to photographs and pictures, to maps and plans." "So far as concerns admissibility, it makes no difference what is the thing on which the words or signs offered may be recorded. They may be * * * on stone or gems or on wood as well as on paper or parchment." In *Merrick v. Wakley*, 8 Adol. & E. 170, 172. Lord Denman, C. J., refers to a book which was kept by the plaintiff as a medical officer, and contained entries of professional visits, as a "document." Mr. Stephen (Ev. 2, 3) defines a "document" as "any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of these means, intended to be used, or which may be used, for the purpose of recording that matter." In the statute 14 & 15 Vict. c. 99, entitled "An act to amend the law of evidence," passed in 1851, it is provided that "whenever any book or other document is of such a public nature as to be admissible in evidence, * * * a copy thereof or extract therefrom shall be admissible." See, also, Starkie, Ev. (9th Ed.) 273, 274. The official publications of the state and national governments, although generally in book form, are denominated "Public Documents," the term being generally abbreviated "Pub. Doc." We therefore decide that a book is a "document," within the meaning of the statute now under consideration.

The defendant further contends that the applicant has not shown that he is "entitled" to said book within the meaning of said statute, it not appearing that he has any property interest or title therein. We do not think it is necessary, in order to warrant the court to order the production of a document under said statute, that the applicant should show a property title therein, but that it is enough for him to show that he is justly entitled thereto by way of evidence in the preparation and trial of his case, and that such evidence is necessary to enable him fully to prosecute or defend the same. It is not necessary, however, to aver or show that, without the discovery sought, the plaintiff will be unable to prove his case. 2 Story, Eq. Jur. (12th Ed.) § 1483; *Peck v. Ashley*, 12 Metc. (Mass.) 478.

The final and principal contention of the defendant is that, as the plaintiff has not shown that it is absolutely necessary for him to have access to said book in order to prepare his case for trial, his application should be denied. We do not assent to so strict a requirement. See *Marsh v. Davison*, 9 Paige, 580, 584. If, as alleged by the plaintiff, the defendant corporation assumed the debts of the association contracted prior to the organization of said corporation, and if, as is also alleged, the plaintiff was a creditor of said association at the time of said organization, and is now also a creditor of said corporation by reason of

services rendered to it since its organization, then, and in such case, we think he is fairly "entitled" to the production of the said record book, which presumably contains the doings of said corporation in the premises, for the purpose of enabling him properly to prepare his case for trial under the pleadings therein. Indeed, we do not well see how he can establish the fact of the assumption by the defendant corporation of the debts of said association in any other way. The application provided for by said statute (which statute is merely declaratory of the common law upon the subject,—*Ely v. Mowry*, 12 R. I. 570, 572) is evidently intended as a substitute for the more ancient and cumbersome method of a bill of discovery for the accomplishing of the same result; and therefore, whenever the application shows a case which would entitle the plaintiff to relief under such a bill, he may have such relief under the statute. 1 Pom. Eq. Jur. § 194. Thus, in Georgia, under the judiciary act of 1799, the superior and inferior courts have power to require "either party to produce books and other writings in his, her, or their possession, power, or custody, which shall contain evidence pertinent to the cause in question, under circumstances where either party might be compelled to produce the same by the ordinary rules of proceeding in equity." In construing this act in *Fairecloth v. Jordan*, 15 Ga. 511, 513, the court adopted the rule laid down by Adams, in his *Doctrine of Equity*, which is as follows: "A defendant is also bound, if required by the plaintiff, to set forth a list of all documents in his possession, from which discovery of the matters in question can be obtained; and if the possession of such documents, and their character, as fit subjects of discovery, can be shown from the answer, he must permit the plaintiff to inspect or copy them." In *Clifford v. Taylor*, 1 Taunt. 167, the defendant, on application, was allowed to take out a summons requiring the production of the letters and papers mentioned in his affidavit, *Mansfield, C. J.*, stating in his opinion that "this practice of compelling the delivery of copies is very convenient, for it saves the delay and expense of a bill in equity." In *Gould v. McCarty*, 11 N. Y. 575, it was held that, under a statute similar to the one now under consideration in so far as the object sought to be accomplished is concerned, the court was authorized to compel a defendant to make discovery of books, papers, and documents in his possession or power relating to the merits thereof, and which are necessary to the plaintiff to enable him to prepare for the trial. See, also, *Goldschmidt v. Marryat*, 1 Camp. 559, 562; *Hill v. Railway Co.*, 10 C. B. (N. S.) 148. In *Townsend v. Lawrence*, 9 Wend. 458, in which the facts were quite similar to those in the case at bar, the court said: "According to the principle and practice of the court

of chancery, a bill called a 'bill of discovery' may be filed for the discovery of facts in the knowledge of the adverse party, or of deeds or writings or other things in his custody or power; and is usually employed to enable the complainant to prosecute or defend an action. 1 Madd. Pr. 160; Lord Montague v. Dudman, 2 Ves. Sr. 398. And if deeds, letters, or other writings are referred to in an answer, the same will, on the plaintiff's motion, be ordered to be left with an officer of the court for the inspection of the complainant or his counsel. 2 Madd. Pr. 299; Bettison v. Farrington, 3 P. Wms. 364; Taylor v. Milner, 11 Ves. 42; Atkyns v. Wright, 14 Ves. 214." The court further said: "The object of the statute was to substitute the rule of court in the place of a bill of discovery where the evidence of which a discovery is sought is of a documentary nature; and the remedy is not confined to cases where the evidence in itself constitutes a cause of action, but extends to all books, papers, and documents relating to the merits of the suit or defense." See, also, Post v. Railroad Co., 144 Mass. 341, 11 N. E. 540; Nieury v. O'Hara, 1 Barb. 484. Had the plaintiff in the case at bar filed a bill of discovery to obtain the production of the record book in question for the purpose set out in his application, we think he would have been clearly entitled to the relief thus sought. See 2 Story, Eq. Jur. (12th Ed.) §§ 1483-1501. And as, under the statute before us for consideration, the application therein provided for was intended to take the place of a bill of discovery, as we have already seen, we see no reason why the plaintiff is not entitled to the same relief.

The cases cited by the defendant's counsel do not controvert, in the main, the general doctrine above enunciated, but principally have to do with what it is necessary to show in the bill or application, in order to warrant the granting thereof, and also are to the effect that courts will not permit parties to merely "fish for evidence" by such a proceeding. This doctrine meets with our entire approval. An application of this sort, as said by this court in Ely v. Mowry, supra, "should set forth particularly the reasons which render it essential to the preparation of the defense, that the order asked for should be made, so that the court may determine whether or not the necessity exists." If the application shows that it is merely an attempt to "fish for evidence," or to "draw the fire" of the opposite party, for the purpose of either making a case or of "cooking up" a defense, or, to state it negatively, if it does not show that the applicant is fairly entitled to the evidence sought,

in order to enable him to properly prepare and try his case, it should be denied. The case of Woods v. De Figaniere, 25 How. Prac. 522, which is much relied on by the defendant's counsel, was one in which the facts were very different from those in the case at bar. In that case the entries sought for were not shown to be evidence, but only to contain information by which evidence might be obtained. It was not alleged that they were in the defendant's handwriting, or that he was in any way privy to them. "Possibly, by inspection," said the court, "the plaintiffs may discover in whose handwriting they are, and obtain their author as a witness to prove the facts contained in them. * * * I apprehend the power of discovering the contents of a written document will hardly be stretched to cover those which only furnish information to enable the applicant to ferret out evidence or witnesses, or where it is not shown that witnesses cannot establish the same facts without the aid of such entries." It is true that the court in that case laid down the rule now contended for by the defendant, —that a discovery "is not permitted in equity merely to enable a party to prepare for trial or prevent surprise," but that "it must furnish evidence to be used on the trial." This statement, however, was not necessary to the decision of the case, nor do the authorities cited in support thereof sustain the position taken. Moreover, the superior court of the city of New York, in the case of Gould v. McCarty, supra, had long before decided that a defendant might be compelled to make discovery of books, papers, and documents which were necessary to the plaintiff to enable him to prepare for trial; and this decision had been affirmed by the court of appeals. See 11 N. Y. 575. In Ely v. Mowry, supra, the discovery was sought to aid in the preparation of the defense. In Congdon v. Aylsworth, 16 R. I. 281, 18 Atl. 247, the discovery was asked in order to enable the complainant "to prepare his case for trial." The discovery of the evidence sought in every case must necessarily precede the trial of the case in aid of which it is sought, and if, therefore, a party is entitled to the evidence to be used at the trial, we see no reason why he is not equally entitled to it to enable him to prepare for the trial. If compelled to wait for the production thereof until the trial should actually begin, more or less delay and inconvenience would necessarily result therefrom. We think the plaintiff shows a case for relief under said statute, and we will therefore grant an order for the production of said book.

JOHNSON STEEL STREET-RAIL CO.
v. NORTH BRANCH STEEL CO.

(48 Fed. 191.)

Circuit Court, W. D. Pennsylvania. Nov. 12, 1891.

In equity. Bill by the Johnson Steel Street-Rail Company against the North Branch Steel Company for infringement of a patent. Heard upon a rule for attachment of John Fulton for contempt in refusing to obey a subpoena duces tecum.

John R. Bennett, for rule. Geo. J. Harding and P. C. Knox, opposed.

REED, J. A bill in equity for infringement of certain letters patent having been filed in the circuit court for the Eastern district of Pennsylvania, and the defendant having answered, Samuel Bell, Esq., was appointed by that court as a special examiner, upon the application of the defendant, to take testimony in this district. John Fulton, who is the general manager of the Cambria Iron Company, a corporation, not a party to the suit, was duly served with a subpoena duces tecum, directing him to produce at the hearing before the examiner certain drawings and templates. Mr. Fulton refused to produce them, although appearing at the hearing in person in obedience to the subpoena. Upon the argument of the rule taken by the defendant's counsel to show cause why an attachment for contempt should not issue, counsel for Mr. Fulton appeared, and the several positions taken in opposition to the rule will be considered.

It was argued that the subpoena had improperly issued from the clerk's office; that a subpoena duces tecum, in such a case as the present, could only be issued by order of court, upon petition or application of one of the parties. A circuit court in one district has power, under the 67th rule in equity, to appoint a special examiner to take testimony in another district (Railroad Co. v. Drew, 3 Woods, 691, Fed. Cas. No. 17,434; In re Steward, 29 Fed. 813); and the court in the latter district has power to issue a subpoena commanding a person living in its district to appear and testify before an examiner or master who has been appointed by the court of the former district, and who is discharging the duties of his appointment in the latter district; and such court also has power, under the 78th rule in equity, to punish such person for refusing to obey such subpoena (In re Steward, supra). Nor do I think it necessary that, in such a case, an application must be made to the latter court for an order directing the subpoena duces tecum to issue, but such a subpoena may issue in the usual manner from the clerk's office, as in ordinary cases. "If documents, the production of which is desired, are in the possession of one not a party to the suit, he may be compelled by a subpoena duces tecum to produce them, and

if the subpoena is not obeyed he will be punished for contempt, on proof by affidavit that the documents are in his custody." 3 Greenl. Ev. § 305. And such a subpoena is in ordinary and general use, and is of compulsory obligation and effect, in courts of law (Amey v. Long, 9 East, 473; Russell v. McLellan, 3 Woodb. & M. 157, Fed. Cas. No. 12,158), and also in courts of equity (1 Daniel, Ch. Prac. 906; U. S. v. Babcock, 3 Dill. 566, Fed. Cas. No. 14,484); and, by the 78th rule in equity, subpoenas may be issued by the clerk in blank, and filled up by the commissioner, master, or examiner, requiring the attendance of the witness at the time and place specified, and this applies as well to subpoenas duces tecum. Section 869 of the Revised Statutes, providing for an order of court, upon which the subpoena duces tecum shall issue, applies to cases where depositions de bene esse are taken under the provisions of section 863, or in perpetuum rei memoriam and under a dedimus potestatem, under section 866. Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724. It does not apply to testimony taken, as in the present case, under the general powers of a court of equity, and in the mode prescribed by the equity rules. An examination of the act of January 24, 1827 (4 Stat. 197), the second section of which was re-enacted as section 869 of the Revised Statutes, shows that it was not intended to apply to all cases.

The subpoena having properly issued, the remaining question is as to the validity of the reasons given in support of the refusal of the witness to obey the subpoena. The affidavit of Cyrus Elder, Esq., attorney for the Cambria Iron Company, which, it was understood at the argument, should be treated as though it were the answer of Mr. Fulton, says that he instructed the witness not to produce the articles called for by the subpoena, and his instructions were intended solely to prevent the disclosure of valuable business secrets of said Cambria Iron Company, and that the disclosures of the witnesses called for, and which the witnesses were required to answer and produce, related to a method of manufacturing a rail, which method has been developed by the Cambria Iron Company with great labor and expense, and that it is said company's valuable private property. In the case of Bull v. Loveland, 10 Pick. 9, the supreme court of Massachusetts discussed the question, and held that the witness was bound to answer a question pertinent to the issue, where his answer will not expose him to criminal proceedings, or tend to subject him to a penalty or forfeiture, although it may otherwise adversely affect his pecuniary interests, and said: "There seems to be no difference in principle between compelling a witness to produce a document in his possession, under a subpoena duces tecum, in a case where the party calling the witness has a right to the use of such document, and

compelling him to give testimony when the facts lie in his own knowledge. It has been decided, though it was formerly doubted, that a subpoena duces tecum is a writ of compulsory obligation, which the court has power to issue, and which the witness is bound to obey, and which will be enforced by proper process to compel the production of the paper, when the witness has no lawful or reasonable excuse for withholding it (*Amey v. Long*, 9 East, 473; *Corsen v. Dubois*, 1 Holt, N. P. 239); but of such lawful or reasonable excuse the court at nisi prius, and not the witness, is the judge."

In *Baird v. Cochran*, 4 Serg. & R. 396, the supreme court of Pennsylvania held that a witness in a civil suit may be compelled to give evidence which may affect his interest, provided it does not tend to convict him of a crime, or subject him to a penalty, saying: "With these exceptions, every man may be compelled, on a bill filed against him in equity, to declare the truth, although it affect his interest. Why, then, should he not be compelled at law, except where he is a party to the suit? [Parties could not then under the laws of Pennsylvania testify or be called to testify.] The court in which he is examined will take care to protect him from questions put through impertinent curiosity, and confine his evidence to those points which are really material to the question in litigation. So far, his neighbor has an interest in his testimony, and no further ought he to be questioned."

In *Ex parte Judson*, 3 Blatchf. 89, Fed. Cas. No. 7,561, the witness objected to testifying, for the reason that the suit was an amicable and fictitious suit, got up to enable the parties to examine the witness, to obtain evidence from him to be used, not in that suit, but in other cases, then pending, in which the witness was interested, and in which such evidence might be used to his prejudice; but the court held that the evidence might be material, that it was bound to assume that the case which, as in this case, was pending in another court, must be presumed to be genuine litigation, and that the witness must answer. In *Wertheim v. Railway, etc., Co.*, 15 Fed. 716, Judge Wallace held that a corporation, not a party to the suit, might be compelled to produce its books and papers in evidence, which might be necessary and vital to the rights of litigants, and that considerations of inconvenience must give way to the paramount rights of parties to the litigation.

It was further contended by counsel for the witness that the articles called for by the subpoena were not such as could be the subject of a subpoena duces tecum. The subpoena required the production of certain drawings and templates. A template, as stated upon the argument, is a piece of sheet

iron, the contour of which corresponds to the opening between the rolls. It was held in the case of *Shepherd*, 3 Fed. 12, that a subpoena duces tecum can only be used to compel the production of written instruments, papers, books, or documents, and that patterns for stove castings were not the subject of such a writ. I think that the subpoena cannot be enforced as to the templates. A document, however, is defined as "an instrument upon which is recorded, by means of letters, figures, or marks, matter which may evidentially be used. In this sense the term applies to writings; to words printed, lithographed, or photographed; to seals, plates, or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps and plans. So far as concerns admissibility, it makes no difference what is the thing on which the words or signs offered may be recorded. They may be on stones, or gems, or on wood, as well as on paper or parchment." 1 Whart. Ev. § 614. So far as material, then, the drawings called for by the subpoena should be produced, and the final question is how far they are material.

The bill in this case is based upon an allegation of infringement of a patent granted March 29, 1887. Defense is made that the patent is void for insufficiency of invention, in view of the prior state of the art, and also that the invention claimed has been in public use for more than two years prior to the date of the application, which was made August 12, 1886. It appears in testimony that rails of the general character of that covered by the patent in controversy were rolled by the Cambria Iron Company, under an arrangement with the plaintiff company, for the latter company, in 1882, and from that time down to the date of the patent. It would seem to be material and pertinent, therefore, to the issue, to inquire into this matter, and the defendant is entitled to the production of such drawings as will show the form of rolls used for that purpose, down to the date of the patent. The form of rolls used since has not been shown to be material to the issue. My conclusion upon this subject is based upon the presentation of the case by counsel, upon only a part of the testimony, and is not intended to, in any manner, anticipate or influence the decision by the circuit court for the Eastern district of the materiality or relevancy of the testimony, of which it alone must finally judge. When the witness produces the drawings called for by the subpoena, in accordance with this opinion, and pays the costs of this application, the rule will be discharged, it appearing that no disobedience of the subpoena was intended; but this mode was taken by counsel to test the questions involved.

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